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No. 10340

United States
Circuit Court of Appeals

For the Ninth Circuit.

Vol
2331

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

FILED

FEB 24 1943

PAUL P. O'BRIEN,
CLERK

No. 10340

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | Page |
|--|------|
| Answer | 40 |
| Appeal: | |
| Certificate of Clerk to Supplemental Transcript of | 243 |
| Certificate of Clerk to Transcript of Record on | 236 |
| Designation of Portions of Record to Constitute Record on..... | 235 |
| Designation of Record, Supplemental, on.. | 242 |
| Notice of | 230 |
| Order Extending Time for Docketing Record on | 231 |
| Order Extending Time for Filing Transcript of Record on (CCA)..... | 232 |
| Statement of Points on Which Appellant Intends to Rely on..... | 233 |
| Statement of Points on Which Appellant Intends to Rely on, Supplemental..... | 240 |
| Certificate of Clerk to Transcript of Record on Appeal | 236 |

| Index | Page |
|---|------|
| Certificate of Clerk to Transcript of Supplemental Transcript of Record..... | 243 |
| Complaint as Amended (Third Cause of Action) Exhibits: | 2 |
| 11—Promissory Note, dated April 6, 1937, in the amount of \$165.00.... | 14 |
| 12—Promissory Note, dated April 22, 1937, in the amount of \$155.00.... | 16 |
| 13—Promissory Note, dated June 15, 1937, in the amount of \$230.00.... | 19 |
| 14—Promissory Note, dated March 28, 1938, in the amount of \$220.11.... | 21 |
| 15—Crop and Chattel Mortgage, dated April 9, 1937..... | 23 |
| 16—Subordination Agreement, dated September 2, 1937..... | 35 |
| Designation of Record, Supplemental..... | 242 |
| Designation of Portions of Record to Constitute Record on Appeal..... | 235 |
| Findings of Fact and Conclusions of Law..... | 219 |
| Judgment of Dismissal (Final)..... | 229 |
| Minutes of the Court of 4/28/42, showing trial as to Third Cause of Action..... | 45 |

Index**Page**

| | |
|---|-----|
| Minutes of the Court of 4/29/42, showing Plaintiff's Motion for Voluntary Non-Suit, and Defendant's Motion for Dismissal with Prejudice | 214 |
| Motion of Defendant for Dismissal..... | 217 |
| Motion of Plaintiff for Continuance or for Dismissal without Prejudice..... | 218 |
| Motion to Dismiss Amended Complaint..... | 39 |
| Names and Addresses of Attorneys of Record.. | 1 |
| Notice of Appeal..... | 230 |
| Order Denying Motion to Dismiss Amended Complaint | 40 |
| Order Extending Time for Docketing Record on Appeal | 231 |
| Order Extending Time for Filing Transcript (CCA) | 232 |
| Order of Dismissal (4/29/42)..... | 215 |
| Statement of Facts..... | 46 |
| Statement of Points on Which Appellant Intends to Rely..... | 233 |
| Statement of Points Upon Which Appellant Intends to Rely, Supplemental..... | 240 |
| Transcript of Testimony..... | 46 |

| Index | Page |
|--|----------|
| Exhibits for Defendant: | |
| 1—Waller's Accounting for Geo. Brisky | 210 |
| 2—Letter, 6/1/38, County Office to Pacific Fruit & Produce Co..... | 212 |
| Exhibits for Plaintiff: | |
| A—Ledger Sheet of Pacific Fruit and Produce Co.—Geo. Brisky, 1937.. | 197 |
| B—Copy of Geo. Brisky's Ledger Sheet given to him..... | 200 |
| C—Produce Ticket—Pacific Fruit & Produce Co., 10/27/37..... | 204 |
| D—Copy of Geo. Brisky Account with Pacific Fruit & Produce Co., May 28, 1938 | 205 |
| E—Summary Transcript of Account of Geo. M. Brisky—United States Department of Agriculture, Farm Security Administration | 207 |
| Witnesses for Plaintiff: | |
| Barrett, O. R. —direct | 137, 145 |
| Brisky, George —direct | 77 |
| —cross | 86 |
| —redirect | 88 |

Index**Page****Exhibits for Plaintiff (Continued):****Nessen, Howard A.**

| | |
|-----------------|-----|
| —direct | 107 |
| —cross | 115 |
| —redirect | 123 |

Phipps, B. R.

| | |
|------------------------|-----|
| —direct | 123 |
| —voir dire..... | 130 |
| —recalled, direct..... | 171 |

Raines, C. D.

| | |
|------------------------|-----|
| —direct | 58 |
| —cross | 70 |
| —redirect | 75 |
| —recalled, direct..... | 183 |

Shons, Merle F.

| | |
|---------------|-----|
| —direct | 183 |
|---------------|-----|

Waller, Henry

| | |
|-----------------|-----|
| —direct | 89 |
| —cross | 96 |
| —redirect | 102 |
| —recross | 104 |

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

EDWARD M. CONNELLY,

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Attorneys for Appellant

RYAN, ASKREN & MATHEWSON,
HOWARD W. SANDERS,

545 Henry Building,
Seattle, Washington.

Attorneys for Appellee

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

COMPLAINT

(As Amended)

The plaintiff, the United States of America, by
Lyle Keith, United States Attorney, and Harvey
Erickson, Assistant United States Attorney, for
the District above named, acting under the author-
ity and by the direction of the Attorney General,
complaining of the defendant, alleges:

* * * * *

Third: For a third cause of action

I.

At all times herein mentioned, the Resettlement
Administration, now the Farm Security Admin-
istration, was, and now is, a division, branch and
official federal agency of the United States of
America, duly created and authorized and empow-
ered to act as such by Executive Order No. 7027,
dated April 30, 1935, and Executive Order No.

7530, dated December 31, 1936, and by reason of said facts the United States of America is the real party in interest herein as plaintiff and the above entitled court has jurisdiction of this action.

II.

That at all times herein mentioned the defendant Pacific Fruit & Produce Company was a corporation duly licensed and qualified to do business in the State of Washington, the principal place of business being located in the City of Seattle, State of Washington.

III.

Between the dates of April 6, 1937 and June 15, 1937 the plaintiff advanced to George M. Brisky and Evelyn Brisky, husband and wife, of [1*] Route 1, Cashmere, Chelan County, Washington, hereinafter referred to as the borrowers, the sum of \$550.00; that in addition thereto the said George M. Brisky and Evelyn Brisky are indebted to the plaintiff in the sum of \$220.11, on account of a balance due on the loan made to them during the year 1936.

IV.

Between the said dates of April 6, 1937 and June 15, 1937, in consideration of the advance of said sum of \$550.00 and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed and delivered to the United States their certain promissory notes in writing

*Page numbering appearing at foot of page of original certified Transcript of Record.

in amounts of \$165.00, \$155.00 and \$230.00, dated April 6, 1937, April 22, 1937, and June 15, 1937, respectively; that on March 28, 1938, in consideration of the balance then due on the 1936 loan, and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed and delivered to the United States their certain renewal promissory note in writing in the said sum of \$220.11, dated March 28, 1938; that a copy of each of said promissory notes are attached hereto marked Exhibits 11, 12, 13 and 14, respectively, and by this reference made a part of this complaint.

V.

On or about April 9, 1937, in order to secure the repayment of the sum of \$795.00, which includes the balance then due on the 1936 loan in the sum of \$630.00, and the sum of \$165.00 which had then been advanced to them and their indebtedness for which is evidenced by their promissory note marked Exhibit 11, and to secure future advances in the sum of \$385.00, which were thereafter made and which are evidenced by their promissory notes marked Exhibits 12 and 13, the said George M. Brisky and Evelyn Brisky executed and delivered to the plaintiff their certain instrument known as a crop and chattel mortgage, a copy of which is attached hereto marked Exhibit 15 and by this reference made a part of this complaint, which crop and chattel mortgage was verified and acknowledged on April 9, 1937, and was thereafter on the

same day filed in the office of the County Auditor of Chelan County, Washington, as Instrument No. 40456.

VI.

By said crop and chattel mortgage, marked Exhibit 15, the plaintiff [2] acquired a first lien on all fruit crops produced or to be produced by the said George M. Brisky and Evelyn Brisky during the year 1937 upon the following described real property, to-wit:

Beginning at a point on the Section line between Sections 11 and 12, Township 23 N. Range 18, E. W. M., 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 12, running thence (corrected course) N. 57 51' E. to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E. along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E. 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S. along the E. line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit:

rendered by the defendant in connection therewith.

XI.

Pursuant to such request and to enable the said borrowers to obtain such additional financing, plaintiff agreed to and did execute a limited subordination agreement in favor of the said Pacific Fruit & Produce Company, a corporation, a copy of which subordination agreement is attached hereto, marked Exhibit 16 and by this reference made a part of this complaint and said defendant was informed of the execution of said subordination agreement by the terms of which agreement the plaintiff subordinated, to the limited extent set forth in said agreement, the lien of the crop and chattel mortgage in favor of the plaintiff, marked Exhibit 15 upon the fruit crop to be produced during 1937 by the said borrowers upon the above described real property to any and all liens thereafter created in favor of the defendant to secure the repayment of funds advanced to the said borrowers or charges incurred for services rendered in connection with producing and thereafter handling and selling said 1937 fruit crop.

XII.

On information and belief, thereafter the defendant herein having [4] accepted the benefits and terms of said limited subordination agreement proceeded in reliance thereon, with knowledge thereof and with knowledge that the plaintiff still continued to assert its prior lien to the extent that it

had not been subordinated by the subordination agreement to advance such funds and render such services as were needed by the said borrowers to aid them in financing such additional costs as were involved in producing and thereafter handling and selling the fruit crops produced during 1937 by the said borrowers on the above described real property; and such fruit crops after harvesting were thereafter delivered by said borrowers to the defendant herein pursuant to the terms of the arrangements effected between said borrowers and said defendant which at the request of said borrowers and pursuant to the arrangements hereinabove referred to proceeded to render all services and perform all acts necessary or related to handling and selling such fruit crops; and all such fruit crops were thereafter sold by the defendant and all proceeds realized from the sale thereof received and retained by the defendant.

XIII.

The plaintiff has no knowledge of the sums advanced to the said borrowers or the value of the services rendered by the defendant pursuant to the arrangements hereinabove referred to between the said borrowers and the defendant herein or of the charges incurred therefor or of the quantity and quality of the fruit crops produced by the said borrowers on the above described real property during the year 1937 and delivered by the said borrowers to the defendant or of the amount of the proceeds of each sale of fruit crops delivered to the

defendant by the said borrowers or of the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 was authorized to deduct and withhold from the proceeds of each sale for the purpose of reimbursing said defendant for the sums advanced to or services rendered for the said borrowers.

XIV.

The plaintiff has repeatedly demanded of the defendant herein that said defendant render to the plaintiff a complete and detailed account of the quantity and quality of the crops produced by the said borrowers on the above described property during the year 1937 and thereafter delivered to said defendant by the said borrowers, of the sums advanced by the said defendant or the value of services rendered pursuant to the aforementioned arrange- [5] ments between said defendant and said borrowers and the charges therefor, of the amount of the proceeds of each sale of fruit crops delivered to the defendant by said borrowers, and of the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 was authorized to deduct and withhold from the proceeds of each sale for the purpose of reimbursing said defendant for sums advanced to or services rendered for said borrowers and has repeatedly demanded of the defendant that the defendant pay over to the plaintiff the proceeds received by the defendant from each sale of

fruit crops delivered to said defendant by the said borrowers over and above the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked as Exhibit 16 to this complaint, was entitled to deduct and withhold from the proceeds of each sale or such portion thereof as was necessary to satisfy the indebtedness of the said borrowers to the plaintiff, the payment of which was secured by the mortgage upon the fruit crops hereinabove referred to and marked Exhibit 15 to the complaint; but the defendant has failed, neglected and refused to render the accounting requested or to pay over to the plaintiff the proceeds received by the defendant from each sale of fruit crops delivered to said defendant by the said borrowers over and above the amount which the defendant, under the terms of the subordination agreement hereinabove referred to and marked Exhibit 16 to this complaint, was entitled to deduct and withhold from the proceeds of each sale or such portion thereof as was necessary to satisfy the indebtedness of the said borrowers to the plaintiff, the payment of which was secured by the mortgage upon the fruit crops hereinabove referred to and marked Exhibit 15 to this complaint; and by reason of defendant's failure, neglect and refusal to render such accountings and to pay over such proceeds plaintiff's security has been materially reduced and material damage to plaintiff has been occasioned thereby.

* * * * *

Wherefore, plaintiff prays judgment that defendant be directed to render plaintiff a just and full accounting of the transactions between the defendant and each of the persons above named and of the transactions engaged in by said defendant for and on behalf of each of said persons and relating to the production, handling or sale of the 1937 fruit crops produced by such persons on the real property above described; that upon such [6] accounting the defendant be required properly to state and prove the sums advanced to each of the persons hereinabove named and the services rendered and the charges incurred therefor pursuant to the arrangements effected between the defendant and each of said persons, the quality and quantity of the fruit crops produced by each of said persons and delivered to the defendant by said persons pursuant to the arrangements hereinbefore referred to between them and the defendant, the amount of the proceeds of each sale of the fruit crops delivered to the defendant by each of said persons and the amount which the defendant, under the terms of the subordination agreements hereinabove referred to, was authorized to deduct and withhold from the proceeds of each sale of fruit crops delivered to the defendant by each of said persons, for the purpose of reimbursing said defendant for funds advanced to or services rendered for each of said persons pursuant to the arrangements hereinabove referred to between the said defendant and each of said persons; that the plain-

tiff have judgment against the defendant for any sums or balances found to be due to the plaintiff upon such accountings, and that the plaintiff have such other and further relief as may be just, together with costs of this action.

LYLE KEITH,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney.

Office and Postoffice

Address:

326 Federal Building

Spokane, Washington.

[Endorsed]: Filed Jan 22, 1941. [7]

EXHIBIT No. 11

Form Ra-Le 31.45B

Number of check—

11-22-35

R. R. case number—

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE NOTE B

For Use in Washington

56-40202,874

County of Chelan

\$165.00

4-6-37

Rt. 1, Cashmere, Washington

City

Date

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of One Hundred Sixty-five and no/100 Dollars (\$165.00), together with interest thereon, at five percent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937.

2. ~~In installments, as follows:—~~

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due,

the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

[8]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated, 19...., cov-

ering livestock, crops, and/or other personal property.

/s/ GEO. M. BRISKY,

(Husband)

/s/ EVELYN BRISKY,

(Wife)

Rt. 1, Cashmere

(Post office address)

Chelan, Washington

(County)

U. S. Government Printing Office 16-4735 [9]

EXHIBIT No. 12

Form RA-LE 31.45

Number of check.....

11-22-35

R R case number.....

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE NOTE B

56-04-202,874-2

For Use in Washington

County of Chelan

\$155.00 Cashmere, Washington. April 22, 1937

(City)

(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of One Hundred

Fifty-Five and no/100 Dollars (\$155.00) together with interest thereon, at five per cent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937

2. ~~In~~ installments, as follows:

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees, and costs of

collection as may be permitted by law to be charged. [10]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated.....19....., covering livestock, crops, and/or other personal property.

Rt. 1, Cashmere

(Post office address)

Chelan, Washington.

(County)

/s/ GEORGE M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

U. S. Government Printing Office 16-4735 [11]

EXHIBIT No. 13

Form RA-LE 31.45 B

Number of check.....

11-22-35

R R case number.....

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE NOTE B

56-04-202,874-2

For Use in Washington

County of Chelan

\$230.00 Cashmere, Washington
(City)

June 15, 1937
(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Washington, the sum of Two Hundred Thirty Dollars and no/100 Dollars (\$230.00) together with interest thereon, at five per cent (5%) per annum from date until paid, payable as follows (strike out inapplicable clause):

1. On or before the fifteenth day of December, 1937

2. ~~In installments, as follows:~~

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States.

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties, and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged. [12]

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, which loan is secured by a chattel mortgage, dated.....19...., covering livestock, crops, and/or other personal property.

Rt. 1, Cashmere

(Post office address)

Chelan, Washington.

(County)

/s/ GEO. M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

EXHIBIT No. 14

Form RA-LE 124

7-28-36

Resettlement Administration

RENEWAL CHATTEL MORTGAGE NOTE B

56-4-202,874-;

~~Idaho~~

Washington

County of Chelan

\$220.11 Cashmere, *Idaho*

March 28, 1938

(City)

(Date)

For Value Received, I, we, or either of us, promise to pay to the order of the Administrator of the Resettlement Administration at his office in Olympia, Wash. the sum of Two Hundred Twenty and 11/100 Dollars (\$220.11), together with interest thereon, at five percent (5%) per annum from the 9th day of February, 1938 until paid, payable as follows (strike out inapplicable clause):

1. On or before the 15th day of February, 1939.
2. In . . . installments, as follows:

Upon the failure to pay any of the said installments, or interest thereon, when the same comes due, the holder may, at his option, declare the entire indebtedness to be due and payable.

The makers, endorsers, sureties, and guarantors of this note hereby severally waive presentment for payment, notice of nonpayment, protest and notice

of protest, and diligence in enforcing payment or bringing suit against any party hereto; and the endorsers, sureties and guarantors hereby severally consent that the time of payment may be extended or this note renewed from time to time without notice to them and without affecting the liability thereon.

In the event any installment of principal of this note or interest thereon be not paid when due and this note is placed in the hands of an attorney for collection, or suit is brought on the same, or any portion thereof, the makers, endorsers, sureties, and guarantors hereby jointly and severally agree to pay such reasonable attorney's fees and costs of collection as may be permitted by law to be charged.

This note is given as evidence of a loan made to the makers hereof by the Administrator of the Resettlement Administration, and is a renewal of a note in the sum of \$250.00 note dated 5-14-36 190.00 note dated 6-13-36 190.00 note dated 7-29-36 (\$.....) Dollars, executed by the [14] makers hereof to the Administrator of the Resettlement Administration on day of, 19...., which loan was and is secured by a chattel mortgage or mortgages covering livestock, crops and/or other personal property and/or a real estate mortgage. The said mortgage and/or mortgages and any other security which the Administrator of the Resettlement Administration may have to secure said loan are not affected by the execution of this renewal note, and all of said security continues to secure the

original loan and any original indebtedness that may be included in this note.

/s/ GEORGE M. BRISKY

(Husband)

/s/ EVELYN BRISKY

(Wife)

Rt. 1, Cashmere

(Post Office Address)

Chelan, Washington

(County) (State)

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States. [15]

EXHIBIT No. 15

Form RA-LE 30.45c

1-8-36

Approved by the Administrator

Resettlement Administration

CHATTEL MORTGAGE

For Use in the State of Washington

56-4-202,874

I. This Mortgage, made this 9th day of April, 1937, by George M. Brisky and Evelyn Brisky, of Rt. #1, Cashmere, (Post-Office Address) County of Chelan, State of Washington, hereinafter called the Mortgagor), to the Administrator (hereinafter called the Mortgagee) of the Resettlement Administration, a Federal agency established by Executive Order No. 7027, dated April 30, 1935.

Exhibit No. 15—(Continued)

II. Witnesseth: That in consideration of, and for the purpose of securing the payment of:

1. The sum of Seven Hundred Ninety-Five Dollars and no/100 Dollars (\$795.00), (together with interest thereon at the rate of five percent per annum), loaned to the Mortgagor, the receipt of which is hereby acknowledged and which debt is evidenced by a promissory note executed by the Mortgagor to the Mortgagee and described as follows:

| Amount of Note | Date of Note | Maturity Date | Rate of Interest |
|----------------|---------------|-------------------|------------------|
| \$165.00 | April 6, 1937 | December 15, 1937 | 5% |
| \$630.00 | July 29, 1936 | May 1, 1937 | 5% |

2. Any additional sum or sums, not exceeding the aggregate sum of Three Hundred Eighty-Five and no/100 Dollars (\$385.00), together with interest thereon at a rate not in excess of five percent per annum, in addition to the indebtedness above described, hereafter loaned or advanced by the Mortgagee to the Mortgagor for any purposes up to the fifteenth day of December, 1937.

3. Any additional sum or sums, in addition to the indebtedness above described, together with interest thereon at the rate of five percent per annum, hereafter expended by the Mortgagee for the purpose of maintaining the value of protecting or preserving the existing collateral, including the payment of taxes on the property which is the subject matter of this mortgage (whether delinquent or otherwise), water assessments and similar charges during the existence of this mortgage, and whether

Exhibit No. 15—(Continued)

or not said advances are made at the request of the Mortgagor and whether they are [16] evidenced by promissory notes or otherwise.

4. Any and all extensions or renewals, and successive extensions or renewals of the note or notes above described, or of the indebtedness represented by the same, and of any other indebtedness at any time secured by this mortgage, whether represented by promissory notes or otherwise, and all the interest on the same, all of which extensions or renewals shall be optional with the Mortgagee, and for all of which this mortgage shall stand as a continuing security until paid.

(All loans and advances made hereunder, to, or for the benefit of, the Mortgagor shall become a part of the principal debt and shall be payable, unless otherwise agreed on or before the 15th day of December, 1937, at the office of the Mortgagee at Olympia, Washington.)

III. The Mortgagor does hereby grant, bargain, sell, and convey unto said Mortgagee, his successors or assigns, the following-described personal property now owned by and in possession of the Mortgagor, and now located in the county of Chelan, State of Washington.

To wit:

1. Livestock: All livestock specifically described as follows: (Give brand, or other markings, age, weight, breed, etc.):

2 White Horses, 1-17 Yrs. 1-12 Yrs., 1600 lbs.
each (Approx.)

Exhibit No. 15—(Continued)

1 Jersey Heifer, L Yr., Dark Red, shading to Black in Color.

1 Jersey Cow, Cream Color, 7 yrs., Horns, "Boss" No Ear Tag.

All chickens owned by me approximately 40 Leghorns and Buff Orphingtons.

23 Hogs—5 Sows white, 2 Yrs.—1 Black Boar—2 years and

17 Shoats—white and black 6 months.

1 Sterling Pump, #6842

1 3 Hp. U. S. Motor, #106740

1 1 Hp. Sears Roebuck Motor

1 1¼" Pump

1 200 Gal. Wood Tank

1 12 Gal. Haride Pump

1 4 Hp. Cushman Engine

150 Ft. (Approx.) of 1¼" Black Pipe

1500 Ft. (Approx.) of ¾" Galv. Spray Pipe

Misc. Orchard Tools and Equipment

1 20 Tooth Spike Tooth Harrow

1 2 Shovel Oliver Ditcher, Steel Tongue,
Horse Drawn

1 2 Horse Disc, 8 Blade, Steel Hookings,
No Seat

1 4 Wheel (Steel) Wagon, Wood Tongue

1 Spring Tooth Harrow

1 McCormick mower, Wood Tongue (Spliced)

1 McCormick Rake, 2x8 Wood Tongue

All of the above-described goods and chattels being found and kept on the farm of George M.

Exhibit No. 15—(Continued)

Brisky, which farm is located 5 miles West of (Direction)* [17] Cashmere, Wn., (nearest town)* and which hereinafter is more particularly described.

3. Crops: All crops, to the fullest extent of the Mortgagor's interest therein, now planted or growing, or to be planted or grown, subject to the following conditions:

All annual field crops, or seed therefor, having been sown or planted within one year from the date hereof; and/or (b) all crops grown upon perennial plants (other than fruit or nut crops) provided this mortgage is executed not more than one year prior to the time the seed, bulbs, roots, or tubers thereof are sown or planted, covering any and/or all crops to be harvested during the first and/or second year after such sowing or planting; and/or (c) any or all crops grown or perennial plants (other than fruits or nuts) the seed, bulbs, roots, or tubers of which have been sown or planted more than two years, provided this mortgage is executed after and not before the 30th day of November of the year preceding that in which such crops grow and mature; and/or (d) all crops grown upon biennial plants, provided this mortgage is executed not more than one year prior to the time the seed thereof is sown or planted, covering any or all crops grown from seed; and/or (e) all fruit or nut crops growing upon perennial trees or plants, provided

*Printer's Note—Written in with pen and ink.

Exhibit No. 15—(Continued)

this mortgage is executed after, but not before, the 30th day of November of the year preceding that in which the crop grows or matures by the Mortgagor, his agent or agents, upon the following-described land in the County of Chelan, State of Washington:

Beginning at a point on the Sec. line between Sec's 11 and 12, Twp. 23, N. R. 18, E. W. M. 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 121 running thence (corrected course) N. 57 51' E, to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 12, Twp 23, N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft.

Exhibit No. 15—(Continued)

to a stake; thence N. 317 ft. to a stake. All of the above in Chelan County, Washington.

4. It is agreed that to the extent permitted by law, this mortgage includes all the property of the kinds above described now owned by the Mortgagor, whether or not same be described specifically herein, all property of like kinds and all other farm property acquired by the Mortgagor during the life of this mortgage, and any and [18] all increase in and all replacements of or additions to the livestock herein mortgaged, and all wool and mohair now on or that may hereafter grow upon or be sheared from the sheep or goats mortgaged hereunder, and all the right, title, and interest of the Mortgagor in and to all feed, seed, fertilizer, supplies, and equipment, and all grazing rights, pasture, and water privileges had, acquired, or held by the Mortgagor in his livestock, fruit, or other agricultural operations during the life of this mortgage.

To Have and to Hold, the said personal property unto the Mortgagee, his successors and assigns, forever.

IV. The mortgagor covenants and agrees that:

1. He is entitled to the possession of the above-described property and that the same is now in his possession at the location above described and that he is the absolute and exclusive owner of said chattels and that the same are free from all liens and incumbrances except as indicated, to wit;

2. The marks and brands above used to de-

Exhibit No. 15—(Continued)

scribe any livestock are the holding brands and carry the title, although the livestock may have other marks and brands;

3. He will warrant and defend all property hereby mortgaged against any or all persons whomsoever;

4. He will properly care for all the property herein mortgaged;

5. He will promptly pay all taxes, liens, and other charges assessed or levied upon or attaching to the property herein mortgaged and upon the above-described premises during the continuance of this mortgage; and will, if requested in writing to do so by the Mortgagee, keep the property fully insured, for the benefit of the Mortgagee, against loss by theft, or by fire or other natural causes;

6. He will expend all funds advanced hereunder by the Mortgagee only for the purposes for which such funds are advanced and only as the Mortgagee shall direct, and a diversion of any such funds to any other purpose will constitute a default under the terms of this mortgage entitling the Mortgagee to exercise the remedies hereinafter specified; [19]

7. He will not sell, remove or encumber the property herein mortgaged or permit others to do so without the written consent of the Mortgagee.

V. Provided, Nevertheless, that these presents are upon the express conditions that if the Mortgagor shall pay unto the Mortgagee, all sums the payment of which is secured by this mortgage, and if he shall fully perform all the terms, covenants,

Exhibit No. 15—(Continued)

and conditions of this mortgage, then this conveyance shall be void, otherwise to remain in full force and effect;

But if default be made in the payment of said principal sum of money, or any installment of principal or interest thereon, as provided in said note or notes, or if the Mortgagor fails to repay any and all advances made by the Mortgagee to or for the Mortgagor, or if the Mortgagor fails to keep or comply with any of the covenants and agreements on his part to be kept and performed as herein stated, or in case any representation herein made by the Mortgagor prove false in any respect, or in case of the actual bankruptcy or of the insolvency of the Mortgagor, or if any of the property subjected to the lien hereof is attached, levied upon, or for any reason taken possession of or detained by any person other than the Mortgagee, or if for any reason the Mortgagee should deem himself insecure, the Mortgagee may, at his option, exercise any or all remedies hereinafter specified, the exercise of which, or any of which, shall be considered as optional with the Mortgagee and cumulative and not as a waiver of any other right or remedy which would otherwise exist in law or equity for the enforcement of this mortgage or the collection of the indebtedness secured thereby.

1. The Mortgagee may, to the extent permitted by law, enter upon the premises where the property herein mortgaged is kept, or is growing, and may do all things necessary to care for said livestock,

Exhibit No. 15—(Continued)

or cultivate and/or harvest said crops, and may take immediate possession of said crops when matured or harvested, and dispose of the same at the best price obtainable therefor. All expenses incurred by the Mortgagee in so doing, together with interest thereon at the rate specified in the note above described, shall be a charge against the Mortgagor and shall be considered secured by these presents and be a lien on said property in the same [20] manner as the principal debt.

2. The Mortgagee may declare, at his option, the whole of the indebtedness hereby secured at once due and payable, and foreclose this mortgage in any manner or form provided by law, and forthwith, if permitted by law to do so, take possession of and sell or remove and sell said property, or so much thereof as may be necessary, to satisfy all indebtedness secured by this mortgage and the interest thereon, together with a reasonable sum as counsel fees, and all expenses, that may be incurred in the keeping, care, transportation, and sale of said property, either at private sale, with or without notice, or at public auction, after giving such notice as is required by law of the time and place of sale and shall apply the proceeds of such sale to the discharge of said debts, interest, and expenses, and shall pay any surplus to the Mortgagor or his assigns.

VI. The Mortgagor, if permitted by law to do so, hereby waives and relinquishes all rights of

Exhibit No. 15—(Continued)

appraisement, sale, or redemption under the laws of the State of Washington.

VII. It Is Agreed That:

1. At any sale made hereunder, the parties hereto, if permitted by law to do so, may purchase as if they were not parties.

2. The words "Mortgagor" and "Mortgagee" shall be construed as including heirs, successors, administrators, executors, assigns, agents, and principals of each.

3. The invalidity of any one or more of the provisions of this mortgage shall not effect the validity of the remainder of the provisions.

In Witness Whereof, the said Mortgagor(s) has (have) hereunto set his (their) hand(s) and seal(s), the day and year in this instrument first above written.

[Seal] /s/ GEORGE M. BRISKY

[Seal] /s/ EVELYN BRISKY

Witnesses:

.....
/s/ MARION H. WEBSTER

As used herein the Resettlement Administration or the Administrator thereof shall be construed to mean the United States. [21]

State of Washington,
County of Chelan—ss:

Be It Remembered, that on this 9th day of April, 1937 before me, the undersigned, a notary public in and for said county and State, personally ap-

Exhibit No. 15—(Continued)

peared the within-named George M. Brisky and Evelyn Brisky, known to me to be the identical persons described in and who executed the within instrument, and acknowledged that they signed, sealed, and delivered the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and seal, the day and year last above written.

/s/ MARION H. WEBSTER

Notary Public in and for the
State of Washington. Re-
siding at Wenatchee.

My commission expires 6/3/39.

State of Washington,
County of Chelan—ss:

The undersigned makes solemn oath and says: That he is the Mortgagor named in the foregoing mortgage; that said mortgage is made in good faith; that the said claim is just and unpaid; and that the foregoing mortgage is given to secure the same without any design to hinder, delay, or defraud creditors.

/s/ GEORGE M. BRISKY

Mortgagor.

/s/ EVELYN BRISKY

Subscribed and sworn to before me this 9th day of April, 1937.

/s/ MARION H. WEBSTER

Notary Public in and for the
State of Washington. Re-
siding at Wenatchee.

My commission expires 6/3/39. [22]

EXHIBIT No. 16

Form RA-11 LE (here follows a number not legible)

Revised 7-7-3 (here follows a number not legible)
Portland, Oregon

United States Department of Agriculture
Resettlement Administration

SUBORDINATION AGREEMENT

Whereas, the United States of America, acting by and through the Secretary of Agriculture pursuant to Executive Order No. 7530 dated December 31, 1936, as amended, is at present the owner of a certain chattel mortgage, executed by Geo. M. Brisky and Evelyn Brisky, of Rt. 1, Cashmere, Washington, hereinafter called the Mortgagor, dated the 7th day of April, 1937, and filed on the 9th day of April, 1937, in the office of the County Auditor of Chelan County, State of Washington, as Instrument No. 40456, which mortgage covers all of the Mortgagor's crops now growing or to be grown on the following described real property, to-wit:

Beginning at a point on the Sec. line between

Sec's 11 and 12, Twp. 23, N. R. 18, E. W. M. 800 ft. S. of the Govt. $\frac{1}{4}$ corner between afore-said Sec. 11 and 121 running thence (corrected course) N. 57 51' E, to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12; thence W to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land; beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N. R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 12, Twp 23, N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft. to a stake; thence N. 317 ft. to a stake. All of the above in Chelan County, Washington.

And, Whereas, the said Mortgagor is in need of additional funds for the purpose of spraying, picking, sorting, washing, wrapping, packing, transporting, warehousing and/or marketing his fruit crop and has applied to Pac. Fruit & Product Co. Cash-

mere hereinafter called the Creditor for a loan for any or all of these purposes,

Now, Therefore, for and in consideration of a loan or advance made or to be made by the Creditor,

The United States of America, acting by and through the Secretary of Agriculture, does hereby subordinate the chattel Mortgage above described to any or all liens upon the Mortgagor's fruit crop for the year 1937 hereafter created by the said Mortgagor in favor of the Creditor to secure said loan, provided, however, that such subordination shall be limited to the extent of Sixty (\$.60) cents per box on all fruit sold by the Mortgagor, and does specifically agree that the Creditor shall have the right to deduct and receive from all sales made [23] by the said Mortgagor of his 1937 fruit crop the sum of Sixty (\$.60) cents per box from each sale made by him until the loan made by the Creditor shall have been paid in full.

This agreement is upon the condition, however, that the United States of America, acting by and through the Secretary of Agriculture, shall have a first lien on all proceeds from each and every sale of any part of the Mortgagor's 1937 fruit crop after the deduction of Sixty (\$.60) Cents per box from the proceeds of such sale has been made by the Creditor.

This agreement does not subordinate any lien held by the United States of America, acting by and through the Secretary of Agriculture, on any property of the Mortgagor other than the fruit

crops grown by him during the year 1937 on the real property herein described, and does not subordinate any lien held by the United States of America, acting by and through the Secretary of Agriculture on any of the property, real or personal, of the Mortgagor to any liens heretofore in existence and held by the aforesaid Creditor, this Agreement extending only to the present advance in consideration of which it is given.

In Witness Whereof, the Secretary of Agriculture has caused this Instrument to be executed by his duly authorized agent, this 2nd day of September, 1937.

HENRY A. WALLACE

Secretary of Agriculture

(For and on behalf of the
United States)

By C. L. SMITH, Agent

(Title) Act. Reg. Dir.

State of Oregon

County of Multnomah—ss.

On this 2nd day of Sept., 1937, before me, O. R. Woods, a Notary Public in and for the County and State aforesaid personally appeared the Secretary of Agriculture by his duly authorized agent, the within named C. L. Smith, to me *Inown* to be the individual described in and who executed the within and foregoing instrument for *an* on behalf of the said Secretary of Agriculture and acknowledged to me that he signed the same as his free and volun-

tary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ O. R. WOODS

Notary Public in and for the State of Oregon.

Residing at Portland, Oregon.

My Commission expires Jan. 13, 1940. [24]

[Title of District Court and Cause.]

MOTION TO DISMISS AMENDED
COMPLAINT

Comes now the defendant by Ryan, Askren & Mathewson, its attorneys, and moves the Court dismissing the above entitled action and each and every cause of action therein contained as amended for the reason and upon the ground that the same does not state a claim against the defendant upon which relief can be granted.

Dated this 6th day of November, 1941.

RYAN ASKREN & MATHEW-
SON

Attorneys for the Defendant.

Copy received 11-7-41.

LYLE KEITH

U. S. Attorney

[Endorsed]: Filed Nov. 7, 1941. [25]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO DISMISS
AMENDED COMPLAINT

This matter coming on for hearing before the above-entitled Court on the 23rd day of March, 1942, and the Court having heard the argument of counsel, and having considered authorities submitted by both the plaintiff and the defendant, and being fully advised in the premises, it is therefore

Ordered and Adjudged that the motion of defendant to dismiss the amended complaint shall be denied and that the defendant shall proceed to file an answer to the plaintiff's amended complaint within 10 days from date hereof.

Done in Open Court this 8th day of April, 1942.

L. B. SCHWELLENBACH

United States District Judge

Approved as to form:

RYAN, ASKREN & MATHEW-
SON

Attorneys for Defendant

Presented by:

HARVEY ERICKSON

Assistant U. S. Attorney

[Endorsed]: Filed April 18, 1942. [26]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the

complaint of the plaintiff denies, admits and alleges as follows:

I.

Answering Paragraphs I and II of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

II.

Answering Paragraphs III and IV of each cause of action set forth in the plaintiff's complaint, the defendant denies it has any knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations therein contained and therefore denies the same.

III.

Answering Paragraph V of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

IV.

Answering Paragraph VI of each cause of action set forth in the plaintiff's complaint, the defendant admits the same excepting only that the defendant denies that said lien on the crop therein described was an essential part of the plaintiff's security.

V.

Answering Paragraph VII of each cause of action set forth in the plaintiff's complaint, the defendant denies it has any knowledge or information sufficient to form a belief as to the truth or falsity of any of the allegations therein contained and therefore denies the same.

VI.

Answering Paragraphs VIII, IX and X of each cause of action set forth in the plaintiff's complaint, the defendant admits the same.

VII.

Answering Paragraph XI of each cause of action set forth in the plaintiff's complaint, the defendant admits that the plaintiff executed the subordination agreement, which is annexed to the plaintiff's complaint as an exhibit, but denies that after the execution of said agreement the [27] plaintiff had any right, title, estate, lien or interest in the crop described in said complaint.

VIII.

Answering Paragraph XII of each cause of action set forth in the plaintiff's complaint, the defendant admits that after the execution of said subordination agreement it advanced to the borrower funds but denies that the plaintiff thereafter had any right, title, estate, lien or interest in the said crop or any part thereof.

IX.

Answering Paragraph XIII of each cause of action set forth in the plaintiff's complaint, the defendant alleges that the plaintiff requested of the defendant permission to examine the books of the defendant to ascertain from the defendant the advances made by the defendant to the borrower and the fruit received by the defendant from the borrower. Notwithstanding the fact that the plaintiff

had no right, title, estate, lien or interest in the said crop, or any part thereof, the defendant did grant permission to the plaintiff to make such audit and such audit was made by the officials of the United States Government and a copy of such audit was delivered to the defendant by the plaintiff. Such audit represents the full and correct value of the fruit on the respective dates set forth in said audit.

X.

Answering Paragraph XIV of each cause of action set forth in the plaintiff's complaint, the defendant denies each and every allegation, matter or thing therein contained, alleged or set forth excepting only as herein elsewhere admitted.

For a First Further and Affirmative Defense to each of the causes of action set forth in the plaintiff's complaint the defendant alleges:

I.

That heretofore the plaintiff obtained a crop mortgage upon the crop described in each cause of action set forth in its complaint.

II.

Thereafter the plaintiff released the lien of its said mortgage [28] on the crop of the borrower, copies of which releases are attached to the plaintiff's complaint, and thereafter the plaintiff had no right, title, estate, lien or interest in the crop of any of the borrowers set forth in the plaintiff's complaint.

III.

Thereafter the defendant advanced to each of the borrowers set forth in the plaintiff's complaint sums on its crop and purchased the entire crop from each of the borrowers and accounted in full to the borrowers for all fruit delivered to it by each of the borrowers.

For a Second Further and Affirmative Defense the defendant alleges that at the time the plaintiff took its said mortgage on the crop of the borrowers described in the plaintiff's complaint it likewise took a mortgage on other personal property belonging to said borrower as set forth in the exhibits attached to the plaintiff's complaint.

That if it should be held that the plaintiff has any right, title, estate, lien or interest whatsoever in the crop described in the plaintiff's complaint the plaintiff should be required to make application of the security included in said mortgage other than the crop before requiring the defendant to render any accounting to the plaintiff for the proceeds of such crop, which crop is the only security which the defendant had for indebtedness due to it by the respective borrowers.

Wherefore, having fully answered the complaint of the plaintiff, the defendant prays that said action be dismissed and that it have and recover its costs and disbursements herein to be taxed.

RYAN, ASKREN & MATHEW-
SON

HOWARD W. SANDERS

Attorneys for Defendant.

Office and Post Office Address:

545 Henry Building

Seattle, Washington

[Endorsed]: Filed April 21, 1942. [29]

[Title of District Court.]

April 1942 Term

13th day

Tuesday, April 28, 1942

Court convened pursuant to adjournment, at
10:00 A. M.

Present: Hon. Lewis B. Schwollenbach, District
Judge, A. A. LaFramboise, Clerk, Harvey
Erickson, Assistant U. S. Attorney, R. R.
Isaacs, Deputy U. S. Marshal and Mrs. J. J.
Cole, Court Reporter.

PROCEEDINGS

* * * * *

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT AND PRODUCE CO.,

Defendant.

RECORD OF TRIAL

Now on this 28th day of April, 1942, this case

was regularly called for trial, both parties being ready. On application of Mr. Erickson, Mr. Kenneth Kaseberg permitted to assist as counsel in the trial of the case.

After the opening statement by each counsel, the trial proceeded as to cause of action No. 3.

* * * * *

Thereupon Court adjourned until April 29, 1942 at 9 A. M. [30]

[Title of District Court and Cause.]

Date: April 28, 1942.

Before: The Honorable L. B. Schwellenbach,
Judge of the above styled court.

Appearances:

For the Plaintiff:

Mr. Harvey Erickson, Assistant
U. S. District Attorney.

For the Defendant:

Ryan, Askren & Matthewson, and
Mr. Howard W. Sanders.

STATEMENT OF FACTS [31]

On this 28th day of April, 1942, the above styled cause coming on for hearing and for trial before the Honorable L. B. Schwellenbach, Judge of the above styled Court, and all parties having announced ready for trial, the following proceedings were had, testimony taken and exhibits introduced:

Judge Schwellenbach: Is there any objection to consolidating the two cases for trial—the Pacific Fruit & Produce and the Miners & Merchant's Bank cases?

Mr. Sanders: I don't know how we are involved in that suit.

Mr. Erickson: You are a witness.

Mr. Sanders: Unfortunately you served subpoena on a man from the bank that knows nothing about it and has no records entitling him to this jurisdiction.

Mr. Erickson: It was his bank bought the fruit.

DISCUSSION

Mr. Sanders: May I make this suggestion. Supposing Counsel makes an opening statement of what his position is and what he intends to prove then let counsel for the defendants make their opening statement of their version of the case and see just exactly how far we are apart and exactly how much the evidence in one case will have a bearing on the other case.

Judge Schwellenbach: All right. We will proceed. Which causes of action in 164 are to be tried?

Mr. Sanders: The third cause of action, your Honor. [34]

Judge Schwellenbach: (Reading from files) You admit paragraphs 1 and 2, that is that the Resettlement Administration, now, the Farm Security Administration, is a branch of the United States Gov-

ernment, and the defendant is a Washington corporation. You deny '3' and '4'——

Mr. Sanders: I might say in regard to the denial of '3' and '4' I think Counsel, if he would produce the letter from the Department showing what the status of those loans is I would not require him to bring the actual officers here—I have no desire to be technical—the letter should be sufficient.

Judge Schwollenbach: Those two are the ones alleging the loan to the Briskys and the execution of the notes by the Briskys to the Resettlement Administration. You admit paragraph '5' which alleges the executing and the filing of the chattel mortgage. You admit '6' in so far as it is a description of the property, but deny its a first lien.

Mr. Sanders: No, I admit its a first lien, but Counsel said it was essential part of the security, and I deny it was essential part. I submit he had other security which was of more value than this.

Judge Schwollenbach: All right. Your same statement as to the letter will apply to paragraph VII?

Mr. Sanders: Yes.

Judge Schwollenbach: You state if he produces the letter that will be sufficient.

Mr. Sanders: Yes. [35]

Judge Schwollenbach: You admit paragraphs 8, 9, 10—those refer to the necessity for additional financing required by the defendant of the crop mortgage and the request for the subordination agreement. Answering paragraph 11 you admit the

execution of the subordination agreement, but deny the legal effect of it.

Mr. Sanders: Yes.

Judge Swollenbach: Answering paragraph 12 you admit you advanced funds after the subordination agreement was executed, but deny that the plaintiff has any legal right in the crop or lien against it.

Mr. Sanders: Yes.

Judge Swollenbach: You really deny 13——

Mr. Sanders: Yes, it is in effect a denial.

Judge Swollenbach: You say you gave them all the information they requested. Then you deny 14. And your first affirmative defense raises the issue of waiver of lien.

Mr. Sanders: Yes, your Honor, whether the subordination was a waiver of lien.

Judge Swollenbach: And the second affirmative defense is they should look to other security before proceeding against you.

Mr. Sanders: Yes, your Honor.

Judge Swollenbach: All right, Mr. Erickson.

Mr. Erickson: In this case involving the sale and the handling and disposing of the Brisky fruit, the fruit of George Brisky, for the year 1937, the Government in this case will attempt to show that the fruit crop of [36] the Brisky orchards was delivered to the Pacific Fruit Company some time during the early part of the harvesting and packing season of 1937, and that it constituted in the vicinity of between eleven and twelve hundred boxes of various sizes, grades and quality of apples,

being some fancys, some extra fancy, 'C' grade, varying in size from 150 to 234 and 252 to the box in the pack out. The contention of the Government will be that under the provisions of the subordination agreement referred to that the United States had a lien upon this fruit crop of the proceeds from that fruit crop except in so far as that lien was insubordinated, basing that upon the wording of the subordination agreement, reading:

“And, Whereas, the said mortgagor is in need of additional funds for the purpose of spraying, picking, sorting, washing, wrapping, packing, transporting, warehousing, and/or his fruit fruit crop and has applied to the Pacific Fruit & Produce Co. Cashmere, hereinafter called the Creditor for a loan for any and all of these purposes, Now, therefore, for and in consideration of a loan or advance made or to be made by the Creditor, The United States of America, acting by and through the Secretary of Agriculture, does hereby subordinate the Chattel Mortgage above described to any and all liens upon the Mortgagor's fruit crop for the year 1937 hereafter created by the said mortgagor in favor of the Creditor to secure said loan, provided, however, that such subordination shall be limited to the extent of sixty cents per box on all fruit sold by the mortgagor, and does specifically agree that the creditor shall have the right to deduct and receive from all sales made by the said mortgagor of his 1937 crop the sum of sixty cents per box from each

sale made by him until the loan made by the creditor shall have been paid in full.”

It is our contention that each sale stands upon its own merits, and, consequently, the highest amount that would be due and owing to the Government would be on the sale of the Extra fancys, and has practically nothing to do or practically nothing due and owing to the Government [37] on the sale of ‘C’ grades, for instance, because of the low price prevailing on ‘C’ grades, which is generally less than sixty cents per box. It is also our contention here the wording of the subordination agreement must be construed to the effect the sixty cents a box takes care of everything, that is, it includes warehousing, picking, sorting, wrapping, transporting, marketing, storage and everything consistently chargeable against those apples, that is, the warehouses are not permitted to set up any additional expenses to add onto the sixty cents a box, making the charge 65 or 75 cents a box, but that the sixty cents is the total limit to which the Government of the United States will subordinate its lien.

Now, our evidence will show that our men from the Farm Security Administration went to the Pacific Fruit Company to view the books of the Pacific Fruit Company and find out the sale price of those apples, and that the Pacific Fruit Company’s books were unsatisfactory to these men. They looked them over. The books did not show where the Pacific Fruit Company sold these apples—or to which

consumer, which retailer bought the apples. The books merely showed certain prices that they claimed they had sold these apples to another Pacific Fruit and Produce Company warehouse in some other vicinity of the United States. And it was impossible to gain anything more from the books. Then the Farm Security Administration accountant copied down certain figures from these books and didn't say they were satisfactory or didn't say anything—that that was a complete accounting—or words [38] to that effect, but merely took down the figures for study and analysis of what they were worth. It appeared from an examination of the books that the Pacific Fruit Company had quoted net price, that is prices less the storage less the advertising, less the marketing to the extent of about 22c a box, in other words quoted a price of 50c a box and had really sold that fruit for 50c plus 22c or 72c a box, but had reported just the net selling price, and that selling price was wholly outside of the scope of the subordination agreement, which was the transaction between the grower and the Pacific Fruit Company and the Government or the limitation of authority there on the Pacific Fruit Company warehouse.

The evidence will show that these sales were made from October, 1937, on into the year 1938, about the last part of February, or the first part of March, 1938. The evidence will also show the Pacific Fruit Company listed a good many of the sales as Jonathans, whereas the sales really were Delicious apples, as will be verified from the grower's memo-

randa, sheets that the Pacific Fruit Company sent to the grower Mr. Brisky when he sent the apples into the Pacific Fruit Company, and Delicious apples are worth or were worth considerably more than Jonathans and they reported a certain number of those sales were Jonathan apples.

The evidence will further show that the Pacific Fruit Company at all times has never given any more figures—have never thrown any more light upon these transactions than they did at the first time the Farm Security Accountants [39] were permitted to go there and copy down these figures. It will be the purpose of the Government in this case to call the manager of the Pacific Fruit Company to the stand and ask him questions about the sales of this fruit, the dates and varieties and warehousing charges, and whether or not these were net prices or gross prices that he reported and accounted for as selling. Then we will introduce evidence based on the market price of fruit in the community at the time these sales were made. We have an expert here who was acquainted at that time with the day to day selling price of fruit of particular grades and varieties. It will be his purpose to testify the prices quoted by the Pacific Fruit were under the prevailing market prices in the community at that particular time on the particular grades and varieties of fruit that were sold, and that, in substance, will be our theory of the case; that the Pacific Fruit should account for each sale independently of the other sales, and are not entitled to take and average all the ‘C’ grades and

all other fruit thruout the season and then say they will pay the Government what is over sixty cents a box and account to the Farm Security Administration for that. They must stand on the individual sales and account on the individual transactions and if the sale brings under sixty cents a box they don't owe the Government a thing, but if the sale should be over sixty cents a box they must account to the United States for that sale and are not entitled to make other deductions except what is mentioned in the subordination agreement. [40] That is substantially what our proof will be. I will suggest to the Court that our Farm Security Member of the bar in Oregon is here to help me with this case and I understand the Court rules to be it is not necessary that he be admitted for a single case.

Mr. Sanders: I think Counsel right off the reel has misunderstood the agreement that the Government signed subordinating the fruit. Counsel said we have not accounted for what we sold that fruit for. Now, I don't see anything in this agreement requiring us to disclose what we sold the fruit for—nothing in there at all. That agreement here says and our evidence is going to show, when Mr. Brisky came in we said 'do you want to sell your fruit?—if you do we will buy it from you' and on certain dates he came in and says 'I want to sell some more fruit' and and on the dates we bought the fruit from him——

Judge Schwellenbach: Is that consistent with your admission in your answer—Paragraph VIII

—“ * * * after the execution of said subordination agreement it advanced to the borrower funds”——

Mr. Sanders: Yes, we advanced to this grower. The Government didn't give them enough money to raise the crop as the Government alleges and he came in to us and from time to time we advanced him money on his crop. When his crop was harvested we asked him do you want to sell it—. Some of those apples he wanted to sell in bulk as loose apples and we bought them that way. Some of them he wanted us to wrap and pack them there, for which we [41] made a charge against him for wrapping and packing, then at such time as he wanted to sell we bought the apples at the market. We do not sell as commission merchants. We bought those apples off of the farmer for our own account and sell them for our own account. This subordination agreement does not say anything about our sale price—it says: “* * * does hereby subordinate the chattel mortgage * * * such subordination shall be limited to the extent of sixty cents per box on all fruit sold by the mortgagor * * * ”—by Brisky, not by the Pacific Fruit— “* * * and does specifically agree that the Creditor shall have the right to deduct and receive from all sales made by the said mortgagor of his 1937 fruit crop the sum of sixty cents per box from such sale made by him until the loan made by the creditor shall have been paid in full.” Now, there is absolutely nothing in that that says that we have to account for what we

sell the fruit for, or where. It's what the mortgagor sold the fruit for. Now I realize in the bulk of these cases where a commission merchant is merely the agent and he sells to somebody else he is merely doing it as agent for the grower, but that isn't true in our case. In this case when that fruit comes in we buy that fruit and give him credit for it right at that particular moment. He is given credit for it. The farmers had agreed to pay a cent a box for advertising, so when the Government auditor came in they took and upped the prices to cover the advertising, and all the prices here are higher than what is shown on the credit on our ledger. [42]

Now, then, so far as the business about Delicious or Jonathans he seems to make a point there was some skullduggery about that. Our ledger shows them to be Jonathans. Now if there is a mistake—who made the mistake—There is no attempt to conceal—we bought Delicious and our ledger shows it. We bought 189 boxes of Delicious. Our evidence will show that as the farmer came in we did the varying processes called for by the subordination agreement. We advanced the money—or services—and bought the fruit outright and credited our ledger page with the purchase price of the fruit. We ultimately sold that fruit—some of it we took a licking on and some we made a profit on—but that doesn't go into the customer's ledger. That is our business. We are not a commission merchant. We are not a cold storage plant. We own a cold storage plant for the benefit of our other branches because we are

nothing more or less than the buying agent. Our local branch is the buying agent to take care of our other branches, and also we do sell in car load lots directly all over the world from there, but these sales are purely our own sales. Now, these dates he has. Those are not the dates we sold the fruit, those are the dates the farmer came in and said 'I want to sell' and we said 'all right—we'll buy.' Those aren't the dates we sold on. We sold out of Chelan county—we sold some 600 boxes of apples. When the subpoena came in Saturday I spent until six o'clock Sunday—I went up there—and couldn't locate all 600—we thought when the Government had taken the audit that was the end of it—this is the [43] first time we knew the people that came in didn't get the information they wanted—the information was all there—they had everything they asked for—it was right there. We thought we had made an accounting to the Government on that and we submit it is the sale price by the grower and not the sale price by the Pacific that controls, and these figures are true and accurate figures, and they are reflected right on the books of the company. And we also take the position that while it may be true the Pacific may have converted the proceeds of the fruit, we contend we are not guilty of conversion and not guilty of breach of contract, and I say again we are not agents. We buy and sell as principals only. We submit they are not entitled to go into the question of our sale price of the apples.

Whereupon

C. D. RAINES,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is C. D. Raines?

A. That's right.

Q. What is your business?

A. Manager of the Pacific Fruit and Produce
Company.

Q. Where is your place of business located?

A. At Cashmere.

Q. During the year 1937 were you likewise manager of the Pacific Fruit and Produce Company?

A. Not at Cashmere. [44]

Q. You were at Chelan Falls then?

A. No.

Q. Where were you? A. Dryden.

Q. The Dryden branch has been abandoned now and all the business handled thru your present branch, is that correct?

A. That's right.

Q. Well, during the year 1937 you were engaged in the apple business at Dryden?

A. That's right.

Q. In the vicinity of Dryden.

A. That's right.

Q. And you bought apples—dealt in the apples raised in the community there?

A. In the Dryden district, yes.

(Testimony of C. D. Raines.)

Q. As such you had business transactions with George Brisky and Evelyn Brisky?

A. No, sir.

Q. During the year 1937 did you not?

A. No sir.

Q. You had no business relations with the Briskys at all? A. I did not.

Q. Did you handle the fruit crop raised by the Briskys? A. I did not.

Q. Who did?

A. My predecessor, Charles F. Cochran.

Q. Where is he now? [45]

A. At Cashmere.

Judge Schwellenbach: You mean your predecessor in your present position?

A. That's right.

Mr. Erickson: Q. And at that time in 1937 you were working in the warehouse there?

A. In Dryden, yes.

Q. And he was manager?

A. He was the manager at Cashmere—I mean Mr. Cochran.

Q. As such were you acquainted with the Briskey transactions? A. I was not.

Q. Do you have the books and figures covering the Briskey transactions with you?

A. Mr. Sanders has it.

Mr. Erickson: (To Mr. Sanders) May I see them?

Q. I hand you what has been marked 'Plaintiff's identification 'A' and ask you to state what that is.

(Testimony of C. D. Raines.)

A. These are the ledger sheets of the Brisky account 1937-'38 season.

Q. By the way, you were manager of the Pacific Fruit Company at Dryden during 1938, were you not, when the auditors of the Farm Security Administration were there?

A. No, I came into Cashmere in May, 1938.

Q. Were you present when they made the audit?

A. Yes.

Q. You went over the figures you had with them?

A. Not me personally—our auditor did.

Q. That was Mr. Barrett? [46]

A. That's right.

Q. Explain briefly what these figures represent.

A. Well, Mr. Erickson, they are just nothing but credits and debits—credit for fruit.

Q. These sheets represent transactions with Mr. Brisky? A. So far as I know, yes.

Q. These represent the disposition of that fruit.

A. That's right.

Q. And the charges made against that fruit for spraying material. A. That's right.

Q. And packing? A. That's right.

Q. Boxes? A. Yes.

Q. According to this memorandum the last sale was made to George Brisky on February 28th, or thereabouts, was it not?

Judge Schwollenbach: Sale to Mr. Brisky?

Mr. Erickson: No, I will strike that—the last sale or disposition of this fruit made by the Pacific Fruit Company was on February 28th—

(Testimony of C. D. Raines.)

Mr. Sanders: Now, I object to that question. The question as to when the Pacific Fruit and Produce Company disposed of this fruit isn't before the Court. The question is when did the mortgagor dispose of the fruit. According to the terms of the subordination we are to account for the sales by the mortgagor and not by the Pacific Fruit. [47]

Judge Schwellenbach: I may agree with you when we get thru but I am trying this case, one of the many causes of action and I am going to be rather liberal to letting the testimony go in. It may go in subject to your objections, but I am not going to pass on that legal question at this time.

Mr. Sanders: May it be understood we object to all of these matters without interrupting each time?

Judge Schwellenbach: Yes. I will overrule the objection.

Q. You stated that you didn't have any personal knowledge of these transactions with Mr. Brisky—do your books and records show that Mr. Brisky asked you to sell these apples on certain dates, or not?

A. I didn't have any dealings with Mr. Brisky.

Q. I am asking whether the books or records show that.

A. This is all we had—these ledger sheets.

Q. They do not show that Mr. Brisky requested you to make these sales from day to day—

Mr. Sanders: He is assuming something not in

(Testimony of C. D. Raines.)

evidence—that is entirely contradictory to the pleadings.

Mr. Erickson: It's according to your opening statement——

Mr. Sanders: No, I said Mr. Brisky sold those apples to us—requested us to buy them. Mr. Brisky did request us to sell them—Mr. Brisky requested us to buy it.

Mr. Erickson: I will withdraw my last question.

Q. I will ask you whether or not your books and records stated that Mr. Brisky asked you to buy this fruit from him from day to day? [48]

A. The ledger sheets do not show that.

Q. Does any memorandum you have show that?

A. There might be some—I haven't them here.

Q. Did you examine your memoranda for that?

A. No, I did not—there might be a short form contract—but I don't know.

Q. So far as you know Mr. Brisky did not ask this company to buy this fruit from day to day as those individual sales would show on this ledger sheet?

A. I wouldn't know.

Q. After you secured that fruit from Mr. Brisky what did you do with it?

A. I had nothing to do with that deal.

Q. What did the warehouse do with it according to your books?

A. Probably shipped it to one of our branches.

Q. Do you know which one?

A. We have them all over the United States. I wouldn't know now.

(Testimony of C. D. Raines.)

Q. Doesn't your branch keep any records of where the fruit was shipped to?

A. Yes, we have car files which might show where some of it went. Might be commingled with several shipments—or might be a 600 car load.

Q. The Brisky fruit was commingled with other fruit?

A. After we bought it.

Q. And that was sold to other branches of your warehouse in other parts of the United States?

A. That is right. [49]

Q. Well, as a matter of fact one branch of the Pacific Fruit Company doesn't sell to another branch, does it?

A. Well, I am a branch and I sell to a branch—I sell to our jobbing houses.

Q. You sell to the jobbing houses?

A. Yes, or ship to them.

Q. Well, what price do you use when you sell?

A. The market price.

Q. And its the market price in the community—in Wenatchee.

A. Its a day to day deal——

Q. Market price, you understand, is what the seller is willing to sell for, but is not forced to sell, transfers to a buyer willing to buy and not forced to buy, isn't that what you understand by 'market price'?

A. You buy apples for cash for so much, tomorrow it would probably be more or less. A grower comes in and wants to sell his apples—

(Testimony of C. D. Raines.)

I say 'I'll give you a dollar a box'—and the next day somebody else comes in and the price is lower and I might give him 90c—it depends on the market.

Q. What determines the market?

A. I don't.

Q. You keep a certain marketing service at your disposal, do you not?

A. Not myself, no. Our jobbing houses tell us mostly what they are willing to pay.

Q. So another Pacific Fruit Company tells you what they are willing to pay and you sell to that house for [50] what they are willing to pay?

A. I ship to them.

Q. Is that an actual transfer of money between your Pacific Fruit branch and the other Pacific Fruit branch?

A. No.

Q. How is the transaction handled?

A. Thru inter-branch.

Q. Just a bookkeeping transaction?

A. That's right.

Q. There is no transfer of money at any time even at the end of the year?

A. No.

Q. What determined the price you were willing to pay the grower?

A. Well, its—if the price is out of line we stay out of the deal. If its too high we stay out. I think they all have practically the same price.

Q. You pay the grower practically the same price as the other apple warehouses?

(Testimony of C. D. Raines.)

A. About the same. We are all about the same.

Q. You pay your grower what your jobbers quote the price to you—by any chance?

A. He don't quote the price. He tells us about what the market is. The boys in Seattle know about what the price of apples is—about what they can sell them at retail.

Q. Your other branches quote the price to you at which they are willing to buy apples from you.

A. They tell us about what the market is in their [51] locality and what they can pay for the apples.

Q. And tell you whether they want any or not.

A. Thats right.

Q. Then you see whether or not you can buy from the grower at that figure.

A. Thats right.

Q. If you can buy from the grower at that figure, then you make a purchase from the grower.

A. Thats right.

Judge Schwellenbach: Do you always have your orders in before you buy? A. Not always.

Q. Supposing you had a car of apples over there for which you paid a dollar, and the price was down the next week and the Seattle office should call up and say 'send us some apples at 95c' would you carry the 95c?

A. We don't have to deliver if the price is less than we paid for them.

Mr. Erickson: Q. The figure then that you can

(Testimony of C. D. Raines.)

transfer to another house determines to some extent what you offer your grower.

A. I don't know as I follow you.

Q. For instance, if you have a house in Minneapolis and offers a dollar a box, that price is controlling what you offer to buy them from your grower.

A. They tell us what the market is. If the market is a dollar they tell us about what the market is. They don't tell me to go out and buy at a dollar—they tell us that is the market at Minneapolis. [52]

Judge Schwellenbach: Do you figure on a profit from your branch?

A. Just warehousing charges.

Q. If you pay a dollar for them you will not be compelled to sell to the other branch for less than a dollar.

A. Some times we have to if the market keeps on declining.

Q. And a temporary fluctuation.

A. We don't have to, no.

Mr. Erickson: Q. Well, you quote your grower a certain price then you add onto that price something, do you not, before you sell to your other house? A. Just warehousing charges.

Q. How much are those warehousing charges?

A. Usually a dime.

Q. You also add on storage charges?

A. No, we do not.

(Testimony of C. D. Raines.)

Q. How do you figure storage if you have apples handled in cold storage?

A. Well, if you own them you can't charge storage for fruit you own.

Q. Supposing the grower hasn't sold to you.

A. It doesn't make any difference.

Q. You say the warehousing charge is ten cents?

A. You usually charge a dime for warehousing.

Q. What does warehousing consist of?

A. Loading and inspection—assembling.

Q. Doesn't include advertising or storage.

A. Not storage, no. The grower pays the advertising. [53] We never mention advertising because its a thing he knows—he knows he has to pay the advertising.

Q. If the market on apples should rise suddenly would you quote the same price to your other jobbing houses?

A. I might raise the price a little bit.

Q. Over ten cents?

A. Yes—naturally every manager tries to make a little money, you know.

Q. Then you will average this ten cents a box over what your branch in some other community will pay. That is the charge.

A. Not on a declining market.

Q. I mean the average circumstances without the market declining.

A. Not the last seven years—the last four years.

Q. But this ten cents a box is added.

(Testimony of C. D. Raines.)

A. I try to make that much, yes—sometimes I can't do it.

Q. Does your branch sell to any other outside fruit companies not connected with the Pacific Fruit?

A. Occasionally we sell an outside car.

Q. You sell those at a greater price than you do to your other branches?

A. If I buy a box of apples for a dollar I try to sell at a dollar ten or a dollar fifteen, or whatever I can get on an outside sale.

Q. If your other house in Minneapolis tells you they are willing to pay a dollar a box what price do you quote the grower? [54]

A. I try to buy it at ninety cents.

Q. Then you add the ten cents on and quote the Minneapolis house a dollar.

A. If he says he will pay a dollar I try to buy for ninety cents.

Q. Well, is the price you quote the grower the gross price or the price less storage and other charges?

A. When I buy from the grower I tell him I buy at a dollar a box—that's all there is to it—he gets the dollar or the ninety cents whatever I quote the grower. Storage has nothing to do between me and the grower. If I buy the apples from him for ninety cents I give him ninety cents.

Q. Supposing the grower puts in a shipment of apples, or a thousand boxes of apples in your ware-

(Testimony of C. D. Raines.)

house on the first of November and keeps them there until the first of April, how do you handle the transaction then?

A. Depends on what kind of a deal he makes to the grower.

Q. If the grower wants to place them in storage without selling would you take them on those conditions? A. If I have space I will, yes.

Q. And if the grower wants to sell at any time you buy from him at the market price.

A. Any time he wants to sell them, that is, unless the prices are too low or over stocked or too large an inventory.

Q. What about storage charges in that event—supposing [55] he went to you the first of April to sell.

A. If he was an independent grower and wants storage space and I have space available I charge him storage rates. We have nothing to do with selling them or handling them, just storage alone. We haven't commercial storage.

Q. There is a standard charge of approximately 18c a box in cold storage from fall to spring?

A. There is not.

Q. What is that charge?

A. It runs from ten cents up to sixteen cents.

Q. What was it in '37?

A. I wouldn't know.

Mr. Erickson: That's all.

(Testimony of C. D. Raines.)

Cross Examination

By Mr. Sanders:

Q. You said that if an independent grower wanted to store apples in your warehouse and you have space you will take them in and charge him the regular storage rate. What do you mean by that—by an independent grower?

A. I mean—a lot of the growers—or growers usually sell in May and June and are not interested in selling to, maybe, the Pacific Fruit—but they want storage space and if available I charge regular storage rates, but no connection outside of just storage.

Q. Those are not what you consider your source of supply? A. No.

Q. You have a regular source of supply from which [56] you obtain apples from year to year?

A. Thats right.

Q. And when you obtain your apples from that regular source do you charge them any storage?

A. I do not.

Q. Now, then, you said that when some other branch quotes you that apples are worth, say, a dollar you try to buy them at ninety cents. Is that the general rule or is that an exception? In other words, do you have apples of your own in stock as a rule or go out and buy them as they come?

A. Both ways. We usually have a small inventory, then we keep buying, keep our inventory up.

Q. Whenever a farmer wants to sell——

(Testimony of C. D. Raines.)

A. I go and buy.

Q. You immediately buy at that time.

A. Yes.

Q. And you take it out of your stock if available?
A. Yes.

Q. And if you haven't it available——

A. I go out and buy it from some other grower. These orders come in for mixed varieties which takes a dozen different growers or lots to fill one order some times.

Q. And thats what you had reference to in answer to the question when the other branch quoted you to go out and buy.

A. Most of our business is mixed varieties—everything in it from Jonathans down to winesaps—all varieties and its pretty hard to have all of these in stock and have to go out and buy a few to fill the car. [57]

Q. At the time you get the orders in do you own the major part of the apples that will go in that car?
A. Yes.

Q. Now you were asked if you tried to add on warehousing charges of ten cents for your branch there. Now, looking specifically at 1937 what was the result of the apple crop in 1937?

A. I sold them for about twenty or twenty five cents less than I bought them for.

Q. Did the branch make any profit on the 1937 crop?
A. Definitely, no.

Q. When the 1937 crop—(To Mr. Erickson)

(Testimony of C. D. Raines.)

Have you offered this in evidence (referring to plaintiff's identification 'A'—ledger sheets).

Mr. Erickson: No. I will offer that in evidence.

Judge Schwellenbach: It may be admitted.

Q. The figures shown on plaintiff's Exhibit 'A'—they are the figures at which you bought the fruit. A. Yes.

Q. When I say 'you' I mean the Pacific Fruit, and not you personally. And would you say that the price at which that fruit was ultimately sold by the Pacific was above or below those figures?

A. Between buying and selling?

Q. Yes. A. Below.

Judge Schwellenbach: You mean the Minneapolis branch sold for less?

Mr. Sanders: No, this branch here sold them below [58] to the other branches or outside customers.

Judge Schwellenbach: This sheet doesn't show the amount the branch got then?

Mr. Sanders: No. This sheet shows what they bought them for. Only the dealing with the Briskys because from then on they were the Pacific Fruit's. I am asking the witness when the Cashmere branch sold either to outside trade or another branch if they went out at a price higher or lower than was paid to Brisky.

Witness: I said lower.

Q. The dates shown on here are the dates at which you acquired the fruit. Are those the dates

(Testimony of C. D. Raines.)

that this branch shipped the fruit either to an independent buyer or to another branch?

A. Yes.

Q. Are they the dates that the fruit actually passed from the Pacific Fruit and Produce company?

A. I don't think I got your question.

Q. The dates as shown on there are they the dates on which the title of the apples ultimately passed from the Pacific Fruit and Produce Company either to some independent buyer or to some other branch?

A. Those are the dates the credit was extended to the grower.

Q. They are the dates you bought from the grower.

A. That's right.

Q. They have no relation to the dates the Pacific Fruit Company sold the fruit to somebody else.

A. None whatever. [59]

Judge Schwellenbach: You say the dates are the credits——

Mr. Sanders: Those are advances made to the grower—the debit is the money advanced.

Witness: The debit side are the advances made to Mr. Brisky, and the second column is the credit and the dates the fruit was credited on his account.

Q. (Mr. Sanders) I believe counsel asked you if you were present at the time the Government auditors were in your place and made an audit of the 1937 purchases.

A. I was there, yes.

(Testimony of C. D. Raines.)

Q. And at that time you were the manager at Cashmere? A. That's right.

Q. Did the auditors at that time make any protest as to the co-operation you gave them?

A. Not to me.

Q. Did they ask for any records that were not furnished to them?

A. I gave them everything they asked for.

Q. And they had at that time the sheets from you for the purchases or the advances you made and the sheets showing the fruit that was delivered to you and they had all the credits and debits shown on that Brisky report? A. Yes.

Q. The original documents showing that.

A. That's right.

Q. And they asked for no further data at all?

A. Not to me, no sir.

Q. (Judge Schwellenbach) Did they ask the auditor for [60] anything that you know of?

A. I don't know. I was in and out at the time.

Mr. Sanders: Our auditor that was present is in court your Honor.

Q. The prices as shown on Exhibit 'A' as credits to the grower are higher than they would have been had you handled them as a commission merchant and credited him as of the date you actually moved the fruit out of the warehouse, is that correct? A. That's right.

Q. Now, he was asking you about the cash transactions—so far as the cash transactions be-

(Testimony of C. D. Raines.)

tween the different branches its very similar to a bank clearing house, isn't it, where each goes into a common clearing house?

A. Yes. Inter-branch clearing.

Q. Then each bank gets credit from it.

A. That's right.

Mr. Sanders: I think that's all.

Redirect Examination

By Mr. Erickson:

Q. Have you any records about the selling price of this fruit to your different branches?

A. Well, they might be recorded, I don't know.

Q. Have you made an effort to secure them?

A. Well I went thru quite a number of car orders. You see we shipped about 600 cars of fruit that year and its pretty hard to tell just what the selling price was.

Q. Approximately?

Mr. Sanders: I might say I personally spent all day [61] Sunday until a quarter to six, and I do have in my files here a number of them, although I haven't them all. We located some 150 of the sheets for the six hundred cars, and I laboriously went thru and picked out a great many of them which I would be glad to submit to you, if you wish.

Mr. Erickson: It would be impossible from this to tell what this branch transferred it to the other branch at.

(Testimony of C. D. Raines.)

Discussion

Judge Schwellenbach: You may take those sheets during the noon hour and see what can be abstracted from them. Figure them out on your own time.

Mr. Sanders: I have some 150 car files. It would take days to go thru them.

Judge Schwellenbach: You can use the noon hour.

Q. (By Mr. Erickson) Was George Brisky a regular client of the Pacific Fruit Company?

A. I don't know.

Q. Has he been a client since 1937. Have you dealt with him continuously?

A. No, I have not.

Q. Now, your figures on this ledger sheet there showing the debits—they represent the amount you advanced Mr. Brisky? A. Thats right.

Q. They represent your total advances to Mr. Brisky for 1937?

A. So far as I know, yes. [62]

Q. Do those prices on that sheet show prices before or after advertising charges have been deducted? A. I couldn't tell you that.

Mr. Sanders: I can answer that question, if you wish, because I checked it personally. The advertising has been taken off of there. I personally made a computation.

(Witness excused.)

GEORGE BRISKY,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is George Brisky? A. Yes.

Q. Where do you live? A. Cashmere.

Q. And you have lived there for a number of years? A. About thirty seven.

Q. And have been engaged in the fruit business for the last several years? A. Yes.

Q. During the years '36 and '37 you had some dealings with the Farm Security Administration of Portland, Oregon. A. I did.

Q. And obtained some loans from the Government. A. I did.

Q. And gave a mortgage covering the fruit crop raised in '37 to the Farm Security Administration. [63] A. Yes.

Q. Where did you sell or dispose of your 1937 fruit crop?

A. To the Farm Security Administration.

Q. You don't mean that, do you?

A. No, I misspoke myself—you were talking about the Farm Security—I meant to the Pacific Fruit and Produce Company.

Q. How was that handled, Mr. Brisky?

A. Well, I can't exactly remember whether it was consignment or cash——

Mr. Sanders. The witness says he can't remember—I object to him guessing.

(Testimony of George Brisky.)

Judge Schwellenbach: If he can't remember whether it was consignment or cash he can't very well testify.

Q. Do you know what kind of a deal you had with the Pacific Fruit Company in 1937?

A. Well, I think it was consignment—I dealt with them in 1938, and I have got prices on certain boxes and varieties and if I sold them in '37 for cash it should have been the same.

Mr. Sanders: I move the answer be stricken. It shows he doesn't know. He is merely guessing.

Judge Schwellenbach: I will not strike it for the present. I will let it stand until Mr. Erickson questions him further.

Mr. Erickson: Q. I hand you plaintiff's exhibit marked for identification 'B' and ask you to state what that is. [64]

A. That's the statement for 1937, I guess.

Mr. Erickson: I ask at this time that the plaintiff's identification 'B' be received in evidence.

Mr. Sanders: No objection.

Judge Schwellenbach: It may be received.

Q. These sheets marked Plaintiff's Exhibit 'B', state where you received them.

A. From the Pacific Produce.

Q. They were delivered to you by the Pacific Fruit & Produce Company? A. Yes.

Q. And these sheets, as you say, represent your transactions with the Pacific Fruit for 1937?

A. Yes.

(Testimony of George Brisky.)

Q. And it begins in August—on August 2, 1937, and shows the debits and credits to the Pacific Fruit does it not? A. Yes.

Q. Do you remember what arrangement you had with the Pacific Fruit and Produce Company now—what conversation you had with the Pacific Fruit people? A. You mean in 1937?

Q. Before you entered into this agreement with them.

A. I don't remember any conversation with them. As well as I remember they taken the fruit on consignment.

Mr. Sanders: Just a moment—he said he doesn't remember. That is strictly contrary to the exhibit you have just introduced.

Judge Schwellenbach: I think it goes to the weight. [65] The testimony does not have any particular value when his first answer is he doesn't know whether he had consignments or sales, and then he says "I think I have consignments"—it will be received for what its worth.

Witness: All my papers—when I sell for cash I get a sheet back like that from not only the Pacific Fruit but the rest of the warehouses—the price is quoted. When I got my return on that there weren't any and that leads me to believe it was consignment.

Q. Did you have a conversation with the Pacific Fruit and Produce Company about the sale of that 1937 crop?

(Testimony of George Brisky.)

A. If I consigned to them——

Mr. Sanders: Just a moment——

Judge Schwellenbach: I will sustain the objection. That would be purely argumentative.

A. I must have had some kind of a conversation with them.

Q. Were you consulted at the time these apples were sold? A. No.

Q. When were these apples delivered by you to the Pacific Fruit Company?

A. Oh, I delivered them at different dates; as I picked them. I hauled them in. I couldn't tell what dates. As long as I picked them.

Q. That was during the harvesting season?

A. Yes, when I got them harvested—they were all in by the time I got them harvested. [66]

Q. Do you remember when you got these returns, plaintiff's Exhibit 'B'—what time it was?

A. No, I don't. Some time after Christmas.

Q. Well what was said to you or by you?

Mr. Sanders: He already answered he doesn't know.

Mr. Erickson: I don't think he has answered this question. I haven't asked it yet.

Judge Schwellenbach: Mr. Erickson said he hadn't completed the question yet.

Q. What was said to you or by you to any member of the Pacific Fruit Company touching on your receipt of money concerning this 1937 fruit crop, or disposition of that fruit?

(Testimony of George Brisky.)

A. Well, I understood——

Mr. Sanders: Object to what he 'understood'.

Objection sustained.

A. Well, I told them to sell on account of the mortgage on the crop——

Q. Did you tell the Pacific Fruit anything as to any amount of money you expected to receive from the crop?

A. I told them I was allowed sixty cents a box for harvesting the crop, see——

Judge Schwellenbach: Who told you that?

A. Charley Cochran.

Mr. Erickson: I refer you to Plaintiff's Exhibit 'A', the memorandum sheet covered by 'B'—referring you to both 'A' and 'B' this check dated August 2, 1937, for \$50—what is that, do you know? Is that an advance to you by the Pacific Fruit? [67]

A. I don't know.

Q. Well, then, this item marked August 10, 1937, 'Red Drum 5 g fish oil' and so on, \$41.67, do you know anything about that item? A. Yes.

Q. What was that?

A. For the freight on it.

Q. Then August 10, 'Recording crop mtg—\$50'—and August 10, '2 gal Fish oil—for g red drum' \$3.82 those were advances made to you by the Pacific Fruit Company? A. Yes.

Q. Then August 31, we run into some credits—those were pears? A. Yes, Bartletts.

Q. Then the debits start in again in September.

(Testimony of George Brisky.)

There is a \$20 check—do you know what that is?

A. I imagine that was for harvesting.

Q. Then we get down here to October 16, 1937, it says '163 Jon. culls—\$11.08' explain that item.

A. That would be culls I suppose what was left after—left over out of the pack.

Q. Then we come down to October 30th—'10 F & F Jons \$2.90' credit—what does that mean?

A. That would be the sale price I imagine—the way I take it.

Q. Then we come down here to November 10—'1088# Spitz culls \$2.72' that represents the payment to you, does it not? [68] A. Yes.

Q. And then there are additional culls, 6.80, 21.42 and 2.41—and then in December the records show you sold six boxes of large Romes and were credited 1.58 at that time, does it not?

A. Yes.

Q. Then 14 boxes of Romes, 8.26, then 189 Delicious at \$135.64 less advertising charge and storage—do you remember anything about that?

A. I know if they were not I wouldn't have to pay the storage—if they were consigned I would pay the storage—if I sold for cash I would sell all at one time like the rest would.

Q. Then there is additional sales of Jons 15.60, and Winesaps, 78.90, and sales of Romes—and so on—. Now by refreshing your memory by that memoranda can you tell us anything more about your relations with the Pacific Fruit Company—

(Testimony of George Brisky.)

about the sale of those apples and the disposition of them?

A. No, I am afraid—its too far back for me to remember.

Q. State whether or not you remember of giving authority to the Pacific Fruit Company to sell any part of your fruit—

Mr. Sanders: If your Honor please he has already said he doesn't know.

A. No, I know I didn't—I never give them authority to sell at any time.

Judge Schwellenbach: He said they never asked him [69] about selling them. The issue was never raised.

Q. Well, Mr. Brisky, state whether or not on any occasion you purchased any fruit from the Pacific Fruit for your own consumption.

A. Yes, I bought a couple of Jons, I think—in fact, I know I did. I think that was all.

Q. Do you know what date you bought those?

A. No, I don't. I know it was in the fall some time.

Q. Do you know what kind of Jons they were?

A. Extra fancy, I think.

Q. Look at plaintiff's Exhibit 'A' and see whether you can find two boxes of fancy Jons there—extra fancy.

(Whereupon the trial was adjourned to reconvene at 1:30 P.M., at which time, all parties present, the trial was resumed. Witness

(Testimony of George Brisky.)

Brisky on the stand for continued direct examination.)

Q. Mr. Brisky, right before lunch I think we were talking about the purchase you had made for gift purposes of two boxes of apples from the Pacific Fruit and Produce Company. Look at Exhibit 'B' here—when would you say that purchase was made? Look at the dates in this column.

A. Well, I would say it was right before Thanksgiving.

Q. Well, refreshing your memory, the date shown here is October 30th, two extra fancy Jons, 1.50—would you say that was the purchase?

A. Yes, thats what I paid for them.

Q. State whether or not in the accounting to you you were given credit for 75c a box for— [70]

Mr. Sanders: Oh, if your Honor please—I object to that. Here he comes in and buys two boxes of extra fancy Jonathan apples for gift purposes and now wants to know if he was given credit for that. In the first place this witness never testified he bought two boxes of apples—

Judge Schwollenbach: I don't think you can prove your prices if a person goes and buys two boxes at a time for gift purposes—

Mr. Erickson: No, I just wanted to show for instance purchases this report of sales here did not list the true prices.

(Testimony of George Brisky.)

Judge Schwellenbach: Where you buy two boxes at a time for gift boxes every one knows when you buy them that way you pay more for them—I don't think that is any standard by which you can show the sale of boxes of apples by the car load. I will sustain the objection.

Q. Now, referring to an item dated December 18, 1937, listed 413 Extra "C" Fancy Jons, storage 8c—can you explain that item?

A. Well it should have been storage only on consignment. If they bought them—they bought them in October and I shouldn't have to pay storage on their fruit.

Q. Have you examined the number of boxes reported in Plaintiff's Exhibit 'B' here—have you examined the approximate number of boxes or number of boxes reported in this exhibit?

A. Yes, I went over the amount.

Q. Do the number of boxes reported here account for all the fruit raised on your farm in 1937— [71]

Mr. Sanders: If your Honor please, that is immaterial.

Judge Schwellenbach: You should say 'and delivered to the Pacific Fruit'.

Mr. Erickson: Q. —and delivered to the Pacific Fruit.

A. Yes—I haven't checked over the Delicious in here. Yes.

Q. There is one item of 189 Delicious, January

(Testimony of George Brisky.)

28, 1938,—92 Extra fancy—82 fancy—and 14 culls—less advertising and storage—that we covered this morning. I now hand you plaintiff's exhibit for identification 'C' and ask you to state what that is, please.

A. Well, I would imagine that would be smaller than packing——

Q. What does the memorandum purport to be? Where did you receive that sheet of paper?

A. From the Pacific Fruit and Produce Company?

Q. Was it mailed to you? A. No.

Q. How did you receive it?

A. I got all my receipts at the office. I'd go down and get them from the office.

Mr. Erickson: I offer this in evidence.

Mr. Sanders: No objection.

Admitted.

Mr. Erickson: You may examine. [72]

Cross Examination

By Mr. Sanders:

Q. You sold these F and F Jons to the Pacific Fruit and Produce Company at 30c less one cent advertising, and received credit \$2.90 on your account?

A. I didn't sell them—thats what they sold them at, I imagine—it would be worth more than that——

Q. You didn't sell them to the Pacific Fruit and Produce Company?

(Testimony of George Brisky.)

A. On consignment—I didn't sell them.

Q. You testified you didn't know what the transaction was.

A. Yes, but I know I didn't sell them for 30c.

Q. A box? A. Yes.

Q. But you did receive this ticket for them on the date it bears, did you not?

A. Yes—might have been a few days after but I received that from them.

Q. Didn't they give this to you at the time you brought the apples in? A. No.

Q. What did you get when you took the apples in?

A. They packed them out and wrote that ticket after they packed them.

Q. You did receive this somewhere at that approximate date? A. Yes.

Q. Did you protest to them about the thirty cents? [73] A. No.

Q. Did you protest to the Pacific Fruit about any of this accounting?

A. Well, in one way—

Q. What do you mean?

A. I got my statement and I figured I had money coming and I told them and they told me they give it to the resettlement. I went down there and they didn't give me no credits so the Pacific still owed me.

Q. You didn't protest to them of the items on this accounting here. A. No.

(Testimony of George Brisky.)

Q. (Referring to 'B'): Doesn't this statement show a balance due from you of \$30.14—doesn't that show you owe the Pacific Fruit \$30.14.

A. It might be there.

Q. Doesn't the statement show that?

A. That's what it shows all right.

Q. Now, let me ask you this. You testified something about what the Pacific told you the Government would permit in the way of over head—what the Pacific told you was under the subordination agreement the Pacific could advance you up to 60 cents a box for raising your crop—that's what they told you, isn't it? A. Yes.

Q. And the money they advanced you was for the purpose of raising your crop, wasn't it?

A. And harvesting it. [74]

Mr. Sanders: That's all.

Redirect Examination

By Mr. Erickson:

Q. Well, did I understand you, Mr. Brisky, to say the Pacific Fruit told you they had paid the resettlement administration some money?

A. They did pay them some—I didn't get that question.

Q. I understand you said the Pacific Fruit told you they paid the resettlement administration some money.

A. Yes, they wouldn't pay it to me. They said they would pay that to them folks, the resettlement.

(Testimony of George Brisky.)

Q. Did they tell you to go to the Resettlement Administration?

A. No, I went down to get credit, and of course they hadn't got it, so I came back to the Pacific and of course they said they would pay them instead of me.

Q. Would pay it or had paid it?

A. Would pay.

Q. Would pay the resettlement?

A. Yes sir.

(Witness excused.)

HENRY WALLER,

a witness called for and behalf of the Plaintiff, having been sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is Henry Waller.

A. Yes sir.

Q. Where do you reside now?

A. San Francisco. [75]

Q. What is your present business?

A. I am working with the Agricultural Marketing Administration.

Q. What was your business in '37 and '38?

A. I was employed in Washington, D. C. up to January 28th, then I was employed by the Farm Security Administration from April to August of 1938.

(Testimony of Henry Waller.)

Q. At Portland, Oregon?

A. Thats right.

Q. The Portland office is the regional office for the three northwestern states, is it not?

A. Thats right.

Q. Just what were your duties with the Farm Security Administration?

A. I was employed for the purpose of getting accountings from warehouses in the Wenatchee area.

Q. And referring to the case of the Pacific Fruit Company, and in particular to the George Brisky account, did you contact the Pacific Fruit Company with reference to that account?

A. Yes sir.

Q. Where and when did you contact the Pacific Fruit Company?

A. Sometime during May at their warehouse.

Q. Where? A. At Cashmere.

Q. Who was with you when you contacted them?

A. Mr. Nessen and Mr. Phipps.

Q. They were Farm Security Administration employees, too, were they? [76] A. Yes.

Q. Which officer or officers of the Pacific Fruit did you contact at that time?

A. Mr. Barrett was in on one of the conversations.

Q. Mr. O. R. Barrett.

A. And the warehouse manager.

Q. What was his name? A. Mr. Raines.

(Testimony of Henry Waller.)

Q. What was your purpose in contacting the Pacific Fruit at that time?

A. To get information on the amount the fruit of Mr. Brisky had been sold for.

Q. Did you get the information as to the number of boxes and the selling price? A. Yes.

Q. Will you state what conversation you had there or was had in your presence with Mr. Raines and Mr. Barrett, or either or both of them?

A. We went over the whole deal—what we wanted and both were very co-operative in giving us figures, and it finally wound up they gave us what purported to be a transcript of their books in each case—the Brisky case and other cases.

Q. I hand you plaintiff's exhibit for identification 'D', and ask you to state what that is, if you please.

A. This is an account they gave me on Mr. Brisky's fruit, showing the sales for the entire year.

Q. Who wrote that out for you?

A. As I recall the warehouse manager, or some person [77] employed by him, I have forgotten which one it was, but it was some one in the warehouse—employed at the warehouse.

Q. Was that prepared in your presence?

A. I don't believe it was.

Q. What was that represented to you as being?

A. The gross sales price on all of Mr. Brisky's fruit that went thru the warehouse.

(Testimony of Henry Waller.)

Q. For the year 1937?

A. Thats right.

Q. Did you total up the number of boxes that are represented in that memorandum?

A. I did.

Q. How many boxes did that add up to?

A. I didn't notice the total on there and I don't recall.

Q. You don't have the total on here, do you?

A. No.

Q. Do you recall whether 1069 is the correct total? A. I wouldn't recall now.

Mr. Erickson: I will offer this in evidence.

Mr. Sanders: No objection.

Admitted.

Q. I refer you to plaintiff's exhibit 'D' and ask you to explain briefly these two columns here—first, the left hand and right hand side columns—state what they mean.

A. The left hand column is the gross sales price as reported, and the right hand column is the same thing less one cent a box. [78]

Q. The right hand column then is the total of the left hand columns is that correct? There are several items combined?

A. No, its less a cent a box.

Q. Well, then, beginning with the fourth item on this page, dated December 18, 1937, listed 47 Extra Jons, 163 and large, then the price 62, then storage marked 8c, what does that mean?

(Testimony of Henry Waller.)

A. That 8c was written in later.

Q. By whom?

A. I am not sure whose handwriting that is—
but the information—

Q. Who was the person—if you don't know his
name—was he a Pacific Fruit employee?

A. No Farm Security employee.

Q. Upon what basis was that written in?

A. It was taken from sales sheets we obtained
from the grower in this case.

Q. You obtained from Mr. Brisky?

A. Thats right.

Q. Did you talk to the Pacific Fruit about that
8c, or have any conversation with any member
of the Pacific Fruit Company about that 8c?

A. I don't believe I did.

Q. You made accountings of many different
growers involving the Pacific Fruit Company in
that vicinity, did you not? A. Thats right.

Q. Over this period of time in 1938. [79]

A. Yes.

Q. Did you arrive at any conclusion about gross
prices and net prices at any time?

Mr. Sanders: Oh, if your Honor please, I don't
think that that question is proper question. Let
this witness tell what he did and what he said.

Judge Schwellenbach: I don't understand what
the question means, first.

Mr. Erickson: I want to bring out from this
witness that as he went ahead with the checking of

(Testimony of Henry Waller.)

these figures in the Pacific Fruit Company case, he found the prices were net prices instead of gross prices, but didn't understand that on the start. He found that out from the grower's statements, and what not.

Mr. Sanders: He can testify what he did—what records they had but as to arriving at some conclusion, or what conclusion he arrived at from all of this, I think its the Court's function to get the conclusion on all of this and not the witness'.

Judge Schwellenbach: I think thats right, Mr. Erickson.

Q. State whether or not you accepted the figures given you by the Pacific Fruit Company on the George Brisky account as being the correct figures?

A. I didn't have any authority to finally accept them for the Government, but I did accept them on my own account.

Q. Did you check them at a later date?

A. Yes.

Q. State when you checked them—verified them.

A. Later on in checking several other accounts after [80] I had been in the warehouse the first time.

Q. What other accounts did you check?

A. There was one named 'Joy'—I don't recall the names right now. There were several accounts in that warehouse and other Pacific Fruit warehouses.

Q. With reference to the Joy account did you check——

(Testimony of Henry Waller.)

Mr. Sanders: Your Honor, I object to that 'Joy' account. That has nothing to do with the case at issue.

Judge Schwellenbach: I take it after he got thru looking over the other accounts he came back and checked this one to find out whether it was gross, or not.

Mr. Erickson: Yes.

Judge Schwellenbach: What difference does it make what might lead him to come back. He might have come back because he was just walking by there. I don't think it makes any difference. If, as a result of later checking on the Brisky account he found it was a different sort of figures than what it showed at the time, I can't see any value in going into the transactions that occurred in the meantime that lead him to come back to this account, because they might have used different figures in every other account than the Brisky account. He can testify what he did the second time he went there and what he found out.

Q. State whether or not you had any conversation with either Mr. Barrett or Mr. Raines on the basis of the first figures you took down there.

A. Well, in all cases we asked for gross prices, prices received by the warehouse. [81]

Q. You asked for the gross prices.

A. Yes, before any deductions were made.

Q. Did you have any later conversation with Mr. Raines or Mr. Barrett about gross prices?

(Testimony of Henry Waller.)

A. Mr. Nessen and Mr. Phipps and I talked to him at different times on it.

Q. At a later time? A. Thats right.

Q. What was said at that time?

A. We went over about the same thing—we wanted gross prices and we didn't think we had them.

Q. What was said by those gentlemen?

A. Well, they said we did have the gross prices. The Pacific Warehouse bought the fruit and sold it to their other branches.

Q. Did you confront them with evidence on the Brisky account on the deductions they had shown there for storage?

A. I don't believe I did. I don't remember.

Q. Did you talk to them about the general method of them doing business? About making storage deductions in any way?

A. Well, I asked them continually if there were storage deductions made and their answer was 'no.'

Mr. Erickson: That's all.

Cross Examination

By Mr. Sanders:

Q. When you went in there the first time you say the Pacific gave you this document marked Exhibit 'D'. A. Yes sir.

Q. And you, yourself, made up one of your forms at [82] that time. A. Yes sir.

Q. And at that time you had plaintiff's exhibit 'D' before you. A. Yes.

(Testimony of Henry Waller.)

Q. You also had the Brisky ledger page that has been introduced here as plaintiff's exhibit 'A', did you not? A. I haven't seen Exhibit A.

Q. (Handing witness Exhibit 'A') You also had the different sheets showing the incoming of fruit from customers, did you not?

A. They were available—whether we checked them particularly in the Brisky case I would not be able to say.

Q. But they were available for you.

A. Yes.

Q. Where there was an eight cent storage charge you got that off the Brisky sales.

A. Not from the Pacific Warehouse. From Brisky himself.

Q. But so far as the Pacific Fruit and Produce Company, they didn't hold out any records?

A. No, they did not.

Q. The sales sheets were there available for you. You did check them in a good many of the accounts, didn't you?

A. I remember we did not check the sales sheets. I don't recall copies given to the customers were available on that. [83]

Q. Weren't the sales sheets there?

A. Not as I recall.

Q. They explained to you the method—what they gave to the grower when he brought in his fruit, didn't they?

A. Yes, the pack-out sheets.

(Testimony of Henry Waller.)

Q. Were those pack-out sheets there?

A. I believe they were.

Q. Did you check them?

A. In some cases we did.

Q. There was nothing to prevent you from checking them in every case if you felt you were justified, was there?

A. That would verify the total number of boxes accounted for.

Q. That Se—you got that from Brisky, you say.

A. Yes.

Q. Now, some of these different accounts you mentioned—you also went to the different growers and checked the data you got from the Pacific of the different growers, too, did you?

A. In some cases we did. We do that on all warehouses.

Q. Then from all the information you gathered here, there and every place you made up your audit, did you not? Showing you defendant's identification '1' I will ask you whether or not that was prepared by you? A. It was.

Q. That was prepared from all this information you got from the various growers you have enumerated. [84]

A. No sir, this is a transcript of the memoranda I got from the Pacific Fruit.

Q. You didn't enter in there this other information you got from various other sources.

A. No sir, not on there.

(Testimony of Henry Waller.)

Q. And you didn't verify this?

A. No, not other than from the Pacific accountant to me.

Q. You didn't verify it from the different data that was there available.

A. Pardon me—I did verify it in so far as possible but the verification is not on here.

Q. You did verify it. A. Yes.

Q. This is a correct accounting according to all the available records of the Pacific Fruit.

A. Except in those cases where there was storage deducted we found.

Q. Why didn't you make some notation of that?

A. I left their accounting at the warehouse at the time I drew it up. You will notice this is a carbon copy.

Q. Did you on any subsequent period mail them any different accounting on account of the warehousing? A. I did not, no.

Q. Do you know of any other warehousing, or storage other than that one item of 8c for boxes that you have noted on there? [85]

A. No, I don't recall of any other items on there—that storage was definitely set out.

Q. In so far as you were able to ascertain that is the only instance in which they charged any storage to Mr. Brisky. A. So far as I know.

Q. You checked with Mr. Brisky and checked all the records available to you?

A. All we could find, yes. As I recall Mr. Brisky didn't have all of his records——

(Testimony of Henry Waller.)

Q. But the Pacific did have all of theirs.

A. Yes, thats right.

Judge Schwellenbach: When did you make out '1'—was that on your first visit in May?

A. I wouldn't say definitely the first visit—Mr. Nessen and Phipps and I visited the warehouse, then I went back myself later on and made a transcript of that accounting the Pacific gave me—not necessarily the first visit.

Judge Schwellenbach: The first visit as compared with later visits when you went back, you say, after you had checked other accounts.

A. Yes.

Mr. Sanders: Q. It was made before you checked with Mr. Brisky? They told you about the one cent storage charge that was added on there?

A. Storage charge?

Q. I mean the one cent advertising charge.

A. I don't believe its added in. [86]

Q. Didn't you testify these figures included in the first column included the one cent——

A. Those are not my figures.

Q. Didn't you testify the extension on the other side of the one cent were taken out—didn't you so testify that that was the situation?

Judge Schwellenbach: You have been asking him about defendant's '1'—anybody reading the record would think you were still talking about '1'—

Mr. Sanders: I beg your pardon—I mean in plaintiff's Exhibit 'D'.

(Testimony of Henry Waller.)

Q. They told you about the fact they had taken out the one cent advertising on there, did they not?

A. Thats right.

Q. I show you defendant's Exhibit '2' for identification, that was mailed out from your office carrying forward the results of your audit that is known as defendant's identification 1, is it not? Was not defendant's identification '1' included right with defendant's identification 2—weren't they mailed together?

A. It may have been. In some cases they are mailed together, and in some cases they are left at the warehouse at the time I was there. In this case it was possibly mailed with it.

Q. It was after you mailed out defendant's identification '2' that you went and checked with Mr. Brisky? A. Yes.

Q. Why didn't you make your whole check at one time before you made up anything? [87]

A. We were checking quite a large number of warehouses and the fruit in most cases had all been sold, and also the question of getting in on the next year's loan—I wanted to get it cleaned up as soon as possible.

Q. You don't know when you checked with Mr. Brisky? A. I don't know when exactly.

Mr. Sanders: I offer exhibits 1 and 2 in evidence.

Mr. Erickson: I will object to '2'—this is merely a statement Mr. Phipps set up based on the first

(Testimony of Henry Waller.)

audit—computation based on the first audit. We never did rely on this audit and its immaterial.

Objection overruled.

Defendant's identification '1' and 2 admitted.

Mr. Sanders: That's all.

Redirect Examination

By Mr. Erickson:

Q. Mr. Waller, after this computation was made by you up there you took the figures down to the Portland office did you not, Defendant's exhibit '1'—those figures, your original copy.

A. I don't remember whether I took them down or mailed them down.

Q. Then Defendant's Exhibit '2' is based on defendant's exhibit '1'. A. Yes sir.

Q. And state whether or not at that time you had any reason to suspect there was anything irregular about those prices.

A. At that particular time I don't believe I did. [88]

Q. And at a later time state whether or not you suspected there was anything wrong.

A. Yes, we did suspect it later.

Q. Was any new statement sent to the Pacific Fruit by yourself to your knowledge after that?

A. I don't recall. I didn't send it if one was sent.

Q. Now, about these storage charges, how did you first become aware of the storage charges on the Brisky account?

(Testimony of Henry Waller.)

A. Well, there were several things leading to it. Take the Chelan Valley Warehouse of the Pacific Fruit, and the accounting there rendered to the clients were in a little different form than the other warehouses, setting forth storage and deducting and checking back on some of the Cashmere growers we found a few instances where actual storage deductions were made. All of that lead us to believe there were some deductions in all cases.

Q. And after checking the Chelan warehouse of the Pacific Fruit Company was the first time you questioned the figures in the Brisky account, is that correct? A. Yes.

Q. What did you do as a result of that?

A. Contacted some of the growers from the other Pacific warehouses—tried to get what statements they had.

Q. Did you contact Mr. Brisky?

A. Yes sir.

Q. What information did you find from his figures? [89]

A. Well, in the case of one sale we found there were actual deductions of warehousing.

Q. Refreshing your recollection state whether or not there were one or two deductions in the Brisky account of storage?

A. Looking at this there are two deductions on two different days there—one on December 18, and one on January 8th.

Q. I believe from Exhibit '1' it is specified as 8c and the other is of no specific amount—

(Testimony of Henry Waller.)

A. That isn't stated on this—(witness refers to Plaintiff's Exhibit 'D').

Q. Looking on Plaintiff's Exhibit 'B', the deduction on 189 Delicious was of an unspecified amount, is that true? A. Yes.

Q. Did you make an effort to determine what that amount was?

A. I believe I did. Yes, I am quite sure I tried to verify that.

Q. What were the results of your investigation?

A. As I recall we found a storage of eight cents on that.

Q. On the Delicious?

A. Wait a minute—yes, I believe so.

Mr. Erickson: That is all. [90]

Recross Examination

By Mr. Sanders:

Q. At the time you were there at the Cashmere branch in the first group of examinations and made up Defendant's Exhibit '1'—you audited all of the accounts at that branch at that time, did you not?

A. Well, it wasn't an audit. I transcribed the information the Pacific gave me.

Q. But you did the whole thing at that time.

A. I believe I did.

Q. I think you said you had at that time plaintiff's Exhibit 'A' before you in doing that, that is correct is it not?

A. I believe I stated it was available.

(Testimony of Henry Waller.)

Q. Didn't you say there you used it in connection, and checked with it.

A. Not in all cases. We knew they were available.

Q. Is it your testimony that all you did was to go up there to the Pacific Fruit and Produce Company and copy down a copy of what is known as Plaintiff's Exhibit 'D', and walk out without checking any of the records that were there?

A. In some cases we checked the records, but ordinarily we didn't—we couldn't trace the fruit in any of the accounts beyond what is in here. You will notice the figures in here are substantially the same as the figures in here——

Judge Schwollenbach: When you say 'here'—that doesn't mean anything in the record—give the name or number of the exhibit you are referring to.

[91]

A. Plaintiff's exhibit 'A' are substantially the same as in Plaintiff's Exhibit 'B'.

Q. You didn't make any effort with all the record there before you to determine or ascertain whether the figures in plaintiff's exhibit 'D' they showed you was correct or not—you took it hook, line and sinker like it was.

A. In most cases—in some cases we checked it thru.

Q. Did you check on this Brisky account?

A. Whether we checked this particular one I don't know.

(Testimony of Henry Waller.)

Q. But the ledger page was put there before you, wasn't it? A. It was available.

Q. And the ledger page shows right on its very face doesn't it, that the Delicious was less storage? Doesn't show right on its very face—that ledger page? A. Yes.

Q. So that information was right there for you at the time you made your first audit, wasn't it?

A. It also lumps all the Delicious together whereas there were various grades and sizes.

Q. All the information was right there available for a complete break down as to all of them, wasn't it? A. Yes, I believe it was.

Q. And plaintiff's Exhibit 'A' itself showed right on its face there was a deduction of storage there, isn't that a fact?

A. Yes, it does show on here. [92]

Q. Judge Schwellenbach: You say these ledger sheets were available—isn't that the first sheet you would look at?

A. As I recall we had this group of cases to go into and on one or two occasions we checked thru and tried to find out what was available, but whether we checked clear thru on the Brisky case, or not, I don't know, but we did find the information was substantially correct taking from the ledger page, so we took the Pacific accounting, and in almost all cases in all accounts they so occurred.

Judge Schwellenbach: You mean after your first visit you had them get up Plaintiff's Exhibit

(Testimony of Henry Waller.)

‘D’ for you, and you then checked those with the ledger sheet?

A. In one or two cases we checked back with the ledger sheet, not in all cases.

Q. And how many of the twenty did you check?

A. Not over one or two, I don’t believe, all the way thru.

Mr. Erickson: I believe thats all.

(Witness excused.)

HOWARD A. NESSEN,

a witness called for and on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name, please.

A. Howard A. Nessen. [93]

Q. And your business?

A. Working for the Farm Security Administration, Portland, Oregon.

Q. Were you so occupied in ’37 and ’38 fruit seasons? A. I was.

Q. What did your work consist of in 1937 and 1938?

A. During that time I was Regional Collection Advisor of the State of Idaho, Oregon and Washington. My job was to advise with the other boys of the Farm Security Administration in making

(Testimony of Howard A. Nessen.)

Collections on borrowers of the Farm Security Administration accounts.

Judge Schwellenbach: Where was your home?

A. Before I came on the Farm Security Administration I was located in Tacoma, Washington.

Q. What was your experience?

A. I spent about eleven years teaching agricultural and related systems in High School.

Q. You never had anything to do with collections, or anything of that kind?

A. Before taking this job with this Administration, no sir.

Judge Schwellenbach: I would like to ask the same questions of Mr. Waller. What was your prior experience, Mr. Waller, what business had you been in?

A. I worked for the Interior Department in Washington.

Q. How long? A. Three and a half years.

Q. What sort of work?

A. International accounting work.

Judge Schwellenbach: That is all. Proceed, Mr. Erickson. [94]

Mr. Erickson: I will offer Plaintiff's identification 'E', if your Honor please.

Mr. Sanders: No objection to the method of identification of it, but I think its immaterial.

Judge Schwellenbach: Subject to your general objection it may be admitted.

Mr. Erickson: This is a summary transcript of

(Testimony of Howard A. Nessen.)

account of George M. Briskey of the balance that was due and owing the Farm Security Administration from Brisky, Principal, \$726.11, and interest accrued to April 25th, 1942, \$107.46.

Q. Now, Mr. Nessen, what did your duties as collection advisor consist of?

A. I advised with the other employees of the Farm Security Administration whose duty it was to collect accounts of loans made by the Farm Security Administration. I had specific assignments such as obtaining of satisfactory accounting from the warehouses in Wenatchee and ascertaining the amount the Farm Security Administration should be able to obtain from fruit loans made during 1937 season.

Q. As such did you contact various warehouses and branches and so on in the Wenatchee district relative to the 1937 fruit crop? A. Yes.

Q. In particular did you contact the Pacific Company about the George Brisky account?

A. I asked them regarding all their accounts. I don't [95] know that I asked them specifically regarding the George Brisky account.

Q. You had a number of growers marketing fruit thru them?

A. Yes, as I recall we had twenty growers who marketed thru the Pacific.

Q. Can you state approximately the circumstances under which you contacted the Pacific Fruit Company the first time, and which members of the Pacific Fruit Company you interviewed?

(Testimony of Howard A. Nessen.)

A. Well, specifically, I went with the other boys to most of the warehouses when we first went out to obtain this information. If I may I would like to go back just a little bit to explain how we came about this deal——

Mr. Sanders: If the Court please, I submit we are interested in the Pacific Fruit and Brisky.

Judge Schwellenbach: I know altogether too much how this 'deal' started——

Mr. Sanders: What we are interested in is what he did with the Pacific Fruit.

Witness: What I meant is what type of explanation I made to these particular warehousemen, when we first went around to talk to them——

Q. You will have to confine it to this particular case, the Pacific Fruit Company.

A. We explained we were interested in ascertaining the amount due to the Farm Security Administration over and above the amount we agreed to subordinate on sales——

Judge Schwellenbach: Was this the visit in May that [96] Mr. Waller testified about?

A. I would say that is correct—May or June.

Q. Go on.

A. We asked them if they would co-operate to the extent of allowing us to check with them thru their books to determine the dates of specific sales and the gross price that was received from fruit of various varieties, grades and sizes and I think without exception that practically all of the warehousemen in the area——

(Testimony of Howard A. Nessen.)

Mr. Sanders: I submit he limit it to the Pacific.

A. I am sorry. The Pacific Fruit Company admitted us into their office—Mr. Barrett was there and Mr. Raines came in and the bookkeeper was present, and we discussed the general problem. We tried to understand their books to the best of our ability, and agreed that Mr. Waller should come back and try to obtain the exact dates, grades, sizes and so forth, the gross price of the fruit, and transfer them onto a form which Mr. Sussman of the Portland office and I prepared simply to record the information we were able to obtain from the warehouse.

Q. State whether or not you can remember any particular conversation in regard to the Brisky case.

A. Well, as I said, we were talking about all of the cases in general and at this time I wouldn't be able to state I could specifically specify any particular case of the group.

Q. State whether or not you made an effort to ascertain just how and when the Pacific Fruit purchased these apples, [97] or acquired these apples.

A. Yes, we did, and we tried to ascertain how they acquired it and its my recollection that the deal they had in accounting for that fruit was different than most of the other dealers and a little more difficult for us to try to figure out the information we were trying to obtain.

Q. State whether or not there was any contention made by the Pacific Fruit Company as to

(Testimony of Howard A. Nessen.)

whether or not they were buying the apples or taking them on consignment or handling them thru other methods, to your recollection?

A. Well, as I recall they stated they simply—their local houses simply handled the fruit for their retail stores scattered around the United States, and they admitted, though, that they did buy fruit from other than their so called own growers, that is, the people who usually dealt with them, I assume, and they occasionally sold fruit to others than their own retail stores.

Q. The people in that catalog weren't the regular customers of the Pacific Fruit—in other words the Farm Security went out and got this group of growers who couldn't secure funds from any place else. Mr. Brisky wasn't a regular customer—the Farm Security clients weren't regular customers of this Pacific warehouse?

A. In some cases they were.

Mr. Erickson: Q. Do you recall just what the specific contention of the Pacific warehouse was, if any, as to how they acquired this fruit from the Farm Security borrowers?

A. You say what their contentions were as to how they acquired it? [98]

Q. Yes.

Mr. Sanders: I think the question is objectionable. I think he ought to ask what they told him.

Mr. Erickson: Thats the same thing.

Judge Schwellenbach: I think thats what he

(Testimony of Howard A. Nessen.)

means. (To witness) What did they tell you as to the way they got this fruit, whether they got it by purchase or on commission, or on consignment, or what?

A. I don't believe they stated whether they got it on commission or consignment. They stated the growers left the fruit there in their warehouse, and I know we had a conference—questioned them quite considerably about the storage. We couldn't understand how they kept the fruit in the warehouse without charging storage on it. As I recall the statements of Mr. Barrett, Mr. Raines and others, they didn't charge any storage and such, and we couldn't understand how they could leave the fruit in there, maybe for several months and still not charge anybody storage for it.

Mr. Erickson: Q. What did they say about that?

A. Well, they admitted there was a difference in price——

Mr. Sanders: I submit that he tell what was said.

Mr. Erickson: He is telling what they admitted.

Mr. Sanders: I think he should say what they said.

Judge Schwellenbach: You aren't going to let them admit it?

Mr. Sanders: I don't want him drawing conclusions as to what they said. When he says 'they admitted'—— [99]

(Testimony of Howard A. Nessen.)

Judge Swollenbach: Tell us what they said.

A. That's rather difficult to do after five years have passed. However, I would say they told us there was a so-called upage, or some other phraseology they used, which signified a difference in the amount they allowed the grower for the fruit on their books, and the amount for which the fruit was transferred to their own retail stores. We wondered whether that was an amount equivalent to storage, and I don't recall they ever told us that was an amount equivalent to storage. I believe they maintained it was not. It seems to me that the amount——

Mr. Sanders: Just a moment——

Judge Swollenbach: Objection sustained.

Q. You will just have to relate the conversation that took place there, what any one of your party said and what any one of them said.

A. Well, I said a moment ago I thought the amount which they called so-called 'upage' was equivalent to the cost of operating their warehouse on the basis of their statement that their warehouses were not supposed to operate at a loss, neither were they to operate at a profit.

Q. You are referring now, of course, to the later conversations, are you not, with the Pacific Fruit?

A. After we had been informed by Mr. Waller and Mr. Phipps' contact with the growers that they had accountings which showed a difference of anywhere from eight to eighteen cents a box.

(Testimony of Howard A. Nessen.)

Q. State whether or not Mr. Raines or Mr. Barrett [100] ever told you that the figures they quoted on their reports to you were the gross or the net figures. Did they make any statement to that effect?

A. I would say they never did make the statement that those were actually gross prices, that is under my understanding of what gross prices were.

Judge Schwellenbach: You mean by that your difference of opinion as to whether or not this ten cents charge was handling charge or storage?

A. My understanding is the gross price would be the price the grower should have received before any deductions were made, whereas they understood the gross price to be the price they showed on these sheets.

Mr. Erickson: I think thats all.

Cross Examination

By Mr. Sanders:

Q. I believe you said that you went into their office in May, 1938 along with Mr. Waller and Mr. Phipps and explained to the Pacific what you wanted.

A. Thats right.

Q. And they welcomed you at the front door and you went over the matter in a general way. Did they at that time disclose these books to you?

A. Yes, they had their books out on one of the tables there.

Q. Did you look at the books at all?

A. Yes, we looked at the books.

(Testimony of Howard A. Nessen.)

Q. Was one of the books there—was that plaintiff's Exhibit 'A' that is there?

A. I couldn't say as to that. [101]

Q. This was taken out of the general ledger, the customer's account—the general ledger customers account was there, was it not?

A. I don't know the books by name, sir.

Q. Didn't they have a book there just like, for instance 'B' showing the debits against him, what they charged his account with and credited his account with?

A. That would be the one contained the Brisky account? I wouldn't swear I saw any sheets dealing with the Brisky fruits at all.

Q. You wouldn't know a customers ledger page if you saw one there? The Pacific Fruit customers ledger page.

A. I don't know whether I would, or not. Ordinarily I would understand what a ledger sheet is if I saw one.

Q. Do you mean to tell this court when you were in there and they had these books there you didn't see the book—this plaintiff's Exhibit A was taken out of which purports to give all the charges against the grower and the credits to the grower?

A. Thats right. I don't know if I saw that book, or not.

Q. You don't know if you saw the book there which purported to have the accounts of the growers?

(Testimony of Howard A. Nessen.)

A. Of course I saw books having the purported growers' accounts.

Q. At the Pacific at that time?

A. Yes sir.

Q. If plaintiff's exhibit 'A' was taken out of such a book then you saw plaintiff's exhibit 'A'.

[102]

A. If it were taken out of one of the books lying on the desk at that time then I saw it.

Q. But you didn't pay any attention to it?

A. Not any particular attention.

Q. Did you pay any attention?

A. We used the books for discussion and Mr. Barrett had particularly pointed out to us some of the problems we were running into in trying to obtain our information from the Pacific Fruit which we had not been running into from some of the other warehouses.

Q. What you have reference to is the warehouses dealing or selling on a commission basis.

A. Not necessarily.

Q. Didn't the Pacific officers at that time tell you they were not in the commission business, but buying fruit outright?

A. They maintained that the majority of the borrowers fruit was lost——

Question Read: "Didn't the Pacific officers at that time tell you they were not in the commission business, but buying fruit outright?"

A. They bought some fruit outright and sold

(Testimony of Howard A. Nessen.)

some fruit to others than their own houses—therefore I understood that they did both.

Q. Did both what?

A. Both types of sales.

Q. Now, we are talking about buying—didn't they tell you that all the fruit they handled they bought themselves and paid the growers for it or credited [103] his account with it?

A. I don't know whether they made that statement or not.

Q. Was there anything in any of their books to show any commission transactions?

A. I don't know. I didn't make that close an examination of their books.

Q. Then you won't say they told you they were buying for their own account the fruit they handled? A. I said they stated they did both.

Q. Both what?

A. Bought fruit for their own retail stores and also bought fruit to sell to others than their own retail stores.

Q. But the fruit they handled they bought. You know the difference between buying on your own account and handling on a commission basis?

A. Yes, I think I do.

Q. Which were they doing, buying on their own account or handling on a commission basis, or do you know?

Mr. Erickson: He has already answered that.

(Testimony of Howard A. Nessen.)

Mr. Sanders: I submit I don't know—

(Question read.)

A. I certainly do not know the internal operations of the Pacific Fruit and Produce Company.

Mr. Sanders: I submit he can answer without a speech. All he can say he doesn't know whether they were buying on their own account or handling on a commission basis.

Witness: My recollection is they were doing both.

Q. Its your testimony they told you they were doing both? [104]

Judge Schwellenbach: You mean by that buying outright and also selling on a commission?

A. Its my recollection that they bought the fruit for their retail stores but that that practice didn't preclude them from operating as other warehouses in the Wenatchee area were operating, that is, taking in one of their own growers fruit, putting it in their warehouse and leaving it there, and as he ordered them to sell it, they sold it.

Q. (Sanders): Did you at any time examine any of the accounts of the Pacific Fruit?

A. Individual grower's account?

Q. Yes.

A. I wouldn't say I did a complete examination. We glanced over the books and discussed some of the problems.

Q. Did you see in there any place a charge

(Testimony of Howard A. Nessen.)

against any grower for commissions on the sale of fruit?

A. On the books which we looked at?

Q. Yes. A. I don't recall we did.

Q. Now you said that this information was much more difficult to get, information from the Pacific Fruit than it was from other sources—why was it more difficult?

A. It was more difficult to get the information we asked for. Most of the warehouses which we visited had books which showed the amount of apples which the grower grew during the season, and brought into their warehouse in loose boxes. Then we had reference to the manifest or pack-out statement showing the percentage of loose boxes which were packed for sale. On the basis of individual sales we were able to trace from that over to [105] another ledger account the exact price which those apples brought. In other words, have the car number in one ledger which referred to another ledger and in that way could easily compute the price per box that was paid for this particular grower's fruit, whereas in the Pacific Fruit and Produce office which I visited we were unable to follow thru as was done in the other warehouses, and thats how our discussion with Mr. Barrett and his staff started as to how to get information from his records.

Q. Didn't they have in their office there avail-

(Testimony of Howard A. Nessen.)

able to you the amount of apples that came in from the farmers?

A. I assume they did. I think they did.

Q. In that regard their record was no different, was it, than any other dealer?

A. I presume up to that point there was no difference.

Q. They had the same pack-out record, didn't they?

A. I don't know—I assume they did.

Q. You didn't show enough concern to find out if they did, is that it?

A. It wasn't our business to find out whether they did, or not.

Q. You were telling how much difficulty you were having with the Pacific Fruit—they didn't have the same records—now, showing you plaintiff's Exhibit 'A' I ask you whether or not that doesn't have right down on it—415 boxes of Jons, 207—isn't it right down there on the ledger page?

A. You mean in this particular account?

Q. Yes—isn't what the farmer got shown right there?

A. Well, here it shows 40 boxes of Jons, \$15.60—shows [106] a credit.

Q. It shows right down there plain—anybody could read it—isn't that a fact?

A. I was talking about gross prices. This refers to a credit.

Q. That's what they paid the farmer for it,

(Testimony of Howard A. Nessen.)

isn't it. They bought that fruit from the farmer, didn't they?

A. I don't know they bought it—I assume it was delivered to them by the farmer.

Q. Doesn't that show they paid the farmer that much money for it?

A. It shows they entered it on their ledger here as a credit.

Q. That doesn't indicate anything than they bought that fruit of the farmer.

A. I don't think that would necessarily constitute a sale or a purchase.

Q. But at least those records show that those apples came in and the farmer got credit for them, doesn't it—and perfectly plain there where anybody could read it.

A. They entered a credit on this particular sheet for that particular grower.

Q. There's nothing difficult in that is there?

A. That is comparatively simple.

Q. Every other item on there is just as simple, isn't it?

A. I haven't examined all the items on here.

Q. Find me a complicated one.

A. I don't see any complicated items on there.

[107]

Q. I see. I didn't think you would.

A. I had no reason to look for any.

Mr. Sanders: That's all.

(Testimony of Howard A. Nessen.)

Redirect Examination

By Mr. Erickson:

Q. State whether or not the difficulty you had was determining the net prices and the gross prices.

A. Thats right.

Q. You didn't have any difficulty understanding the figures they gave you——

A. That is, understanding the sheet such as this sheet for instance?

Q. Yes.

A. No, we would have no difficulty understanding their entries.

Mr. Erickson: That is all.

(Witness excused.)

B. R. PHIPPS,

a witness called for and on behalf of the plaintiff,
having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. State your name please.

A. B. R. Phipps.

Q. What is your business?

A. Farm Security Administration District supervisor.

Q. What district are you supervisor of now?

A. Distrcit No. 3 in Washington.

Q. That includes all of Washington?

(Testimony of B. R. Phipps.)

A. Includes six counties, Chelan, Douglas, Grant
[108] Kittitas, Yakima—

Q. During 1937 and '8 what was your business then?

A. County supervisor in Wenatchee in Farm Security.

Q. You had charge of the Wenatchee District?

A. Yes.

Q. What was your experience before you accepted a position with the Farm Security Administration?

A. I was born in Wenatchee there and have grown up on a fruit farm.

Q. Directing your attention to the 1937 fruit crop around Wenatchee did you contact the Pacific Fruit Company with reference to their disposition of the 1937 fruit crop—of some of your clients in the Wenatchee district?

A. I was in company with Mr. Waller and Mr. Nessen at the time the situation was generally discussed with Mr. Barrett and Mr. Raines.

Q. State in your own words what was said in that discussion, Mr. Phipps.

A. Well, I can't give you any details of the discussion other than the fact that during the conversation it was brought up their fruit dealings were different than some of the other warehouses—they did sell to their own branches, their own units.

Q. Do you recall any conversation with the Pacific Fruit people as to the George Brisky account?

(Testimony of B. R. Phipps.)

A. At the time I made my contact with them we were just starting into the record, the procedure of trying to get an accounting and there were no comments at all in relation to any particular borrower or borrowers. [109]

Q. Was there any conversation between the people at the meeting as to whether or not the Pacific Fruit Company purchased that fruit or handled it on a consignment basis, or what was said along those lines?

A. Well, it was my understanding the company did buy the fruit—that is, they had it in storage—they bought it—that was my understanding of it.

Q. What was said about that if you recall?

A. You mean with regard to how they purchased it?

Q. Yes.

A. Well, there was no difference as I understand it—they made the purchase from the grower—in other words they purchased the fruit—is that what you had reference to?

Q. Was anything said about the times with which, or, rather at which they purchased the fruit?

A. I don't recall.

Q. Maybe I don't express myself clearly. Was there anything said about the consent or non-consent of the grower about sales, and if so, what was said?

Mr. Sanders: If your Honor please: just a moment now. This witness has already testified

(Testimony of B. R. Phipps.)

it was said the Pacific bought the fruit from the farmer. Its perfectly obvious having bought the fruit from the farmer there would be no occasion to turn around and ask the farmer if they could sell something they had bought.

Objection overruled.

Q. Was anything said by any officer of the Pacific Fruit Company about their methods of purchasing from the grower, and if so, what was said?

[110]

A. You mean as to how they purchased the fruit?

Q. Yes, with respect to the time.

A. I don't recall.

Q. State whether or not there was anything said there with reference to the prices shown by the Pacific Fruit on their ledger being gross prices or net prices?

A. Well, they didn't at any time indicate gross or net price. At least, I don't recall the discussion coming up at that point whether it was gross or net price as they indicated on the accounts at the time they were given.

Q. Well, after that conference at the Pacific Fruit Company at the time all of them—all of you were there, you were shown the figures then and Mr. Nessen had prepared defendant's Exhibit '1', a carbon copy of those things, did he not—or Mr. Waller—pardon me.

A. May I have your question again, please?

(Testimony of B. R. Phipps.)

Q. At the time Mr. Waller was there, I mean after you were there Mr. Waller prepared that defendant's Exhibit '1', did he not?

A. That's right.

Q. That was taken from what?

Mr. Sanders: Just a moment: was he present at the time?

Mr. Erickson: He knew what it was being taken from. I understand he was there before it was taken down.

Mr. Sanders: Was he there when it was prepared?

Judge Schwellenbach: Mr. Waller testified he thought he came back a second time and got the figures on this exhibit.

Witness: It was the understanding it was to be taken from the gross sales, if that is what you mean— [111] gross sales information that was the understanding.

Q. Then after Mr. Waller took down those figures at a later date did you get to see them?

A. Yes, I saw them.

Q. Did you inspect those figures at a later date?

A. Yes, in the office.

Q. And after inspecting those figures what did you do then? Did you make any further checks?

A. I made further checks on some of the borrowers' records of their own that was brought to my attention.

Q. What was the purpose of making further checks?

(Testimony of B. R. Phipps.)

A. To make sure we were getting the gross sale price.

Q. To make sure the price the Pacific Fruit quoted was the gross price instead of the net price?

A. Thats right.

Q. What success did you have?

A. We found some accounting that didn't indicate that was always the case.

Q. Did you make any check with reference to the Brisky transaction?

A. I don't remember that case particularly. I do remember other cases I can recall.

Q. Well, at a later date did you make any check on the Brisky transaction? A. Yes.

Q. What did you discover then?

A. I discovered that the accounting showed there was some storage involved in the Brisky accounting, and that also the exhibit shown here—I don't recall [112] the number, 'D', I believe—which we had used as a basis—

Mr. Sanders: Just a moment: unless the witness was there at the time that was prepared I object to him testifying what was the basis—my understanding is he wasn't even present—

Q. Were you present when defendant's exhibit '1' was made? A. No.

Mr. Sanders: I object to any testimony as to what was used to make defendant's exhibit 1—he testified he wasn't even present.

Objection sustained.

(Testimony of B. R. Phipps.)

Q. After you received defendant's exhibit 1 just how did you verify the check?

A. The only thing we had as far as I was concerned—I wasn't particularly qualified along accounting lines—that wasn't my particular phase—the only thing I could verify was that the accounting which had been rendered Mr. Brisky didn't check with the accounting which is given here.

Q. Explain the discrepancy.

A. The fact there were no Delicious entered on the exhibit which came into my hands, and which later was shown in Mr. Brisky's accounting—also the fact the 189 Delicious showed advertising and storage deducted. There were also storage deductions in the case of Jonathan sales.

Q. State whether or not—Mr. Phipps in connection with your work for the apple season of 1937, state whether or not you were acquainted with the market [113] prices in fruit—apples—the buying and selling price—the market price in Wenatchee.

Mr. Sanders: If your Honor please, I must object to that.

Judge Schwollenbach: He can answer that by 'yes' or 'no'.

A. Yes.

The Court: Now do you wish to examine him on his voir dire qualifications as to that question?

Mr. Sanders: Yes, I would like to examine him on it.

(Testimony of B. R. Phipps.)

Voir Dire Examination

By Mr. Sanders:

Q. What experience did you have in 1937 in buying and selling fruit?

A. Not buying and selling—I do not qualify on that basis—simply a matter of keeping in touch with the market and knowing what the markets were.

Q. You merely checked the reports of sales reported in from various accounts.

A. Reporting systems, yes.

Q. And your sole source—or knowledge of the market prices is based entirely on information you gathered——

A. No—

Q. What other source?

A. Keeping in contact with warehouses themselves—I had to know what was going on so far as sales were concerned.

Q. You knew the prices the warehouses were buying for their own account—you knew the prices they were [114] paying the grower.

A. Yes.

Q. You knew then the prices the Pacific were paying to the growers of fruit they were buying.

A. On the fruit I saw on that particular account at the time I contacted them on it.

Q. That was from time to time as the season went along, or at the close of the season?

A. No, from time to time.

Q. From time to time thruout the season you knew the price the Pacific was paying Brisky for fruit to them.

(Testimony of B. R. Phipps.)

A. No, I don't recall whether I ever checked on any particular account—I have no recollection of going down and saying 'let me see Mr. Brisky's account' on a particular day.

Q. Were you checking what the Pacific was paying to growers on fruit the Government had a loan on from time to time?

A. That was my business being acquainted with the market sufficiently so as to advise growers that contacted me from time to time.

Q. Did you know from time to time what the Pacific was paying to the growers which you had loans on their fruit?

A. I was acquainted with what they were paying as a rule. The average sale, enough so I knew pretty much the basis, at least.

Q. Did you during the course of that time or season advise the Pacific they were buying their fruit below the [115] market where the Government had a loan?

Judge Schwellenbach: That might be cross examination but its not voir dire.

Mr. Sanders: I will reserve it for cross examination your Honor.

Q. Now does the question of the ripeness of the fruit change the value of the fruit?

A. You mean the maturity of the fruit?

Q. Yes.

A. Yes, that is if its almost at the point of decay.

(Testimony of B. R. Phipps.)

Q. And the ripeness short of decay does not affect it?

A. It might affect the price that fruit would bring.

Q. Isn't it a fact that during the season the same class of fruit is selling at different prices on the same day, the same fruit?

A. You mean with regard to sizes?

Q. No, the same size, the same grade, isn't there a great variation, as high as twenty five cents?

A. Either way, up or down?

Q. Either way, up or down.

Judge Schwellenbach: You mean on the same day there would be a difference of twenty five cents?

Mr. Sanders: Any way from the figure of twenty five cents.

Witness: I don't think it would vary that much.

Q. How much would it vary?

A. It might vary ten or fifteen cents—

Q. Ten to fifteen cents a box on the same day, the same fruit. [116]

A. Its possible. Depends on where its being sold.

The Court: How many loans did you have there that year? A. Approximately 379.

Q. And how much did they amount to?

A. In the neighborhood of \$400,000.

Q. Your job was to service those loans?

A. Thats right.

The Court: Overrule the objection on the question of qualification.

(Testimony of B. R. Phipps.)

Mr. Erickson: I understand no further questions are necessary to qualify the witness.

Judge Schwellenbach: I have overruled the objection to that question.

Q. (By Mr. Erickson): Mr. Phipps, were you acquainted from day to day with the market price of fruit in Wenatchee and community based on size, quality and grade during the 1937 season, fruit season?

A. I had to keep in touch with the markets from time to time, day to day. We had market information available to our office.

Q. You were acquainted with the market prices?

A. Yes.

Q. I call your attention to October 27, 1937, the ten boxes of Jonathan apples, graded F & F, size all, can you state what the market price would be at that particular time in Wenatchee?

Mr. Sanders: Now, if your Honor please. There is just absolutely no basis for any such question as that. [117] The defendant in this case is charged with the conversion of certain apples. Now, I gather from Counsel's statement there to the effect it is his contention the Pacific converted this fruit at the time they sold it to some other customer—as a matter of fact if we converted it it would have to be at a time——

The Court: What difference would it make—if I go out and buy an automobile with a mortgage on it, and I pay for it—I buy it subject to the

(Testimony of B. R. Phipps.)

mortgage and if I put it away in such a way the mortgagee can't get it, then I have converted it, haven't I?

Mr. Sanders: But there is no evidence before this Court we did that on October 27th with that fruit. So far as the evidence before this court is concerned that fruit was right there in our warehouse—

The Court: What is that date?

Mr. Sanders: That is the date we bought the fruit from the farmer. Its not the date we shipped it. The evidence shows it is not the date we shipped it.

The Court: Is that correct?

Mr. Erickson: Its our contention the fruit was sold on that day.

Mr. Sanders: Sold to the Pacific by the farmer.

Mr. Erickson: Sold from one branch of the Pacific to another branch.

Mr. Sanders: No. Mr. Raines testified that was the date he bought the fruit from the farmer, and it was shipped out at a later date. There is not a syntilla of evidence as to the date that fruit was shipped out— [118]

The Court: My present impression is this—I may be wrong—for the purpose of this line of testimony I am not going to consider the subordination agreement. We are trying to arrive at the amount, if there was a conversion. The Pacific bought the fruit from the grower subject to the

(Testimony of B. R. Phipps.)

mortgage. Now, if the Pacific had gone out like the rest of the dealers did and sold it on the market and the record shows the date they sold it and shows no extension of the amount on the amount due on the mortgage then that is the date on which they converted the fruit and you would be entitled to prove how much they got for it. Now, it seems to me the testimony now shows because of the fact instead of selling it they shipped it to various places around the country, mixing it in with a lot of other fruit, if they destroyed the possibility of knowing what the selling price of that fruit was by shipping it away, making it impossible to trace it, my present attitude is to let you prove what the market price was at the date they shipped to various branches in the United States. It seems to me clear you can't prove the date on which they bought the fruit from the farmer—I am not going to say now that that constitutes the conversion—or that is the measure of damages owing you, but separating this section of the case I will permit you now to prove the market value on the day they shipped it to the various branches. They bought it from the grower subject to your mortgage, and they did not convert it on that date. When they made it impossible for you to ascertain how much they got for it [119] that I would consider is the date of conversion. I will sustain the objection to the question, if that is the date they bought it from the grower.

(Testimony of B. R. Phipps.)

Mr. Erickson: A subpoena duces tecum has been served on the Pacific to show the date they shipped and sold these apples, and I understand they are here now and say they can't show that.

Mr. Sanders: We have records when we shipped a great deal of it—we have a whole apple box of records showing the shipment of fruit, but I can't show how much we actually got for the fruit at this time—we shipped some 600 boxes of apples out of here and they are there—I also wish to object to this on the further ground the evidence shows that the subordination agreement provides for the sale from the 'mortgagor——

The Court: We will argue about that later. At present I wish to separate this section of the case and see if they can prove what amount of damages were sustained by sending the fruit away from Chelan county.

Mr. Erickson: I would like to call some witness from the Pacific Fruit to show when they did ship this fruit.

Mr. Sanders: Here are the specific documents——

Judge Schwellenbach: I thought I told you gentlemen to do that on your own time at the noon hour.

Mr. Sanders: There are some six hundred cars there, and according to counsel we converted this fruit at varying periods of time. Its the Government's case to prove when we converted it— [120]

(Testimony of B. R. Phipps.)

Mr. Erickson: I would like the privilege of excusing Mr. Phipps temporarily and calling either Mr. Barrett or Mr. Raines and finding out when this fruit was shipped out of the state.

The Court: I think Mr. Barrett is the man who was there at the time. Why don't you call him?

Whereupon Mr. Phipps was excused temporarily and

O. R. BARRETT,

a witness called by the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Your name is O. R. Barrett?

A. Yes.

Q. And you are chief accountant for the Pacific Fruit and Produce Company?

A. One of the chief accountants.

Q. Where is your office? A. Seattle.

Q. You have the records of the shipments of the George M. Brisky and Evelyn Brisky fruit of the 1937 crop from Cashmere?

A. Mr. Sanders segregated a good portion of the records Sunday, and they are on the table there.

Q. Will those records disclose the shipment of this fruit out of Cashmere to certain parts of the United States and other parts of the United States?

(Testimony of O. R. Barrett.)

A. It does disclose it in a good many cases, and in a good many cases it doesn't. [121]

Q. Will you get those records?

Mr. Sanders: I think if your Honor will rule on the question as to whether or not the transaction means that its a sale by the mortgagor as called for in the subordination agreement——

The Court: I will rule against you on that——

Mr. Sanders: The subordination agreement does specify sales by the mortgagor. The Government's auditors here have testified the Pacific bought that fruit from the mortgagor—there is absolutely no charge——

The Court: Subject to the mortgage which is of record and of which you had knowledge.

Mr. Sanders: And on the basis where we were entitled to deduct sixty cents from the price to the mortgagor. Now there is absolutely no evidence in this case, not even a hint of collusion—no allegation in the complaint of collusion between us and the mortgagor. There are books there showing what fruit was sold by the mortgagor. Under the terms of that agreement we didn't agree to account to the Government for the difference between the market value of the fruit, only to account on the basis of what the mortgagor sold the fruit for.

The Court: Objection overruled.

Mr. Sanders: Allow us an exception.

The Court: Exception allowed.

(Testimony of O. R. Barrett.)

Q. Do you have the records there of the Brisky Fruit that was sold and shipped by the Pacific?

A. There is one file for thirty boxes of fruit in January. [122]

Q. What kind of fruit was that?

A. Fancy Saps.

Q. On what day?

A. The car was shipped January 22d.

Q. 1938? A. That's right.

Q. Where was it shipped to?

A. That car was shipped to C. M. Kopp for export thru Tacoma.

Q. Does your record disclose the price?

A. Yes.

Q. What was the price?

A. The car was sold for forty five cents.

The Court: That was sold to an exporter?

A. Yes—he was exporting that particular car.

Q. What did the car consist of—all fancy Wine-saps?

A. A straight car of Fancy Winesaps.

Q. Do your records there disclose the sale of any other Brisky fruit?

A. It would disclose it if it was moved out in a reasonable length of time after it was harvested before they began consolidating the fruit in the various storage rooms. After, I would say possibly, the first of December it would largely lose its identity, then we would regard it as Pacific house stock.

(Testimony of O. R. Barrett.)

Q. Do you have the shipping records there of any other of the Brisky fruit except that thirty tons?

A. Yes, there are quite a few there. Mr. Raines is picking out some now where we can identify them—— [123]

Q. When was this fruit commingled?

A. After we buy the various lots of fruit when our inventory is running low we keep what we call a working margin of the fruit on hand from which to fill orders and have the fruit in our possession and belonging to us, and as it is sold out and stock of certain varieties and grades is lowered we will buy from various growers who wish to sell on that particular day. We also buy to fill in orders of which we are short—the rest of the fruit is placed in storage as our own. It might be shipped next week and it might not be shipped for sixty days.

Q. Well, you don't know now just when Mr. Brisky's fruit was shipped beyond the thirty boxes.

A. Its impossible to tell when the other shipments were made. A large portion of it, I would say more than half, may not have been shipped out until after the first of the year. The only way to get clear as to the identity of that fruit we do have a manifest of the car loading of them in a large number of instances which show the code number of the box.

Q. Did you treat all the Brisky fruit as your own after the 15th of December?

(Testimony of O. R. Barrett.)

A. Depends on when it was purchased, and if we purchased it we regard it as our own, even though there is a part of it not shipped out on the day it was purchased. We can't buy in little parcels. Even though we need only ten boxes to fill a car the manager would buy possibly a hundred boxes.

Q. When did you claim title to this Brisky fruit? [124]

A. When it was entered on the ledger.

Q. The dates that are marked here on the exhibit?

A. Yes.

Q. It was commingled before that time, though.

A. No.

Q. You don't know exactly when it was commingled with other fruit, do you?

A. No, it depends on when we began assembling it in certain lots. We might have a half a dozen lots purchased and move them all into that room, then the identity is largely lost. We can trace it in some cases—in most cases you can't.

Mr. Sanders: Before you get thru I want to cross examine this witness a little bit.

Mr. Erickson: I submit the testimony is most unsatisfactory. He has accounted for only thirty boxes——

The Court: You went out and purchased apples from Mr. Brisky—now how soon after you got his apples in there did you commingle them with other apples so as to make it impossible to trace it?

A. That would depend largely on what the mar-

(Testimony of O. R. Barrett.)

ket situation was at that time. If it was strong and considered it was going higher we would carry a large inventory, probably thirty or forty thousand dollars worth of fruit purchased at harvest time. If we thought it was going to be weak we probably wouldn't want more than a small working margin of three or four or five thousand dollars——

The Court: How soon after you purchased—you purchased [125] a certain number of boxes of Winesaps out of which you sold thirty in one shipment to this exporter over at Tacoma, the rest of it probably went into your warehouse and was intermixed. Now, how soon after you made any particular purchase from Mr. Brisky was this other fruit that wasn't immediately shipped out of your warehouse put into your warehouse?

A. Well, it would be in the warehouse to start with.

The Court: I mean intermingled.

A. At packing time it would be placed away very quickly to make space—later on it might not.

The Court: Look at your ledger sheet—that shows your purchases from Mr. Brisky.

A. Yes, these purchases run thru from September to February 28th.

Mr. Sanders: May I ask the witness a couple of questions?

Q. Each grower that you buy from has a separate marketing number, does he not?

(Testimony of O. R. Barrett.)

A. Yes.

Q. So as long as any of that fruit is in the warehouse it can be segregated according to the marking on the boxes. A. Yes.

Q. The only thing when you ship out fruit you consider you have bought you do not on your manifest show the particular growers name.

A. Ordinarily no. That would depend largely on the care of the loader. Some car loaders put a lot of detail on their manifest, and others don't even segregate any of it. [126]

Q. However, as long as this fruit is in your warehouse it can be segregated.

A. As long as the box is in existence.

Q. If you found that box in New York or any place else you could from the marking on it tell the source of that box?

A. Thats right—from the code number on the box.

Mr. Sanders: I submit its not up to the defendant——

Judge Schwellenbach: I can't believe a person has a right to take mortgaged fruit, and purchased it with knowledge of its mortgage, as you did and then put it out of your own control in such a way you can't tell anybody who came there what became of it—when it was sold, how much it was sold for, and avoid the responsibility to the mortgagee.

Mr. Sanders: We can tell to a large extent by going thru these car records. The Government

(Testimony of O. R. Barrett.)

served on us Saturday evening a subpoena to have these records here for early Tuesday morning.

Mr. Erickson: I told you in Wenatchee two weeks ago——

Mr. Sanders: Its perfectly obvious it would be a physical impossibility where we have moved out some six hundred cars out of this one place for us to go thru the files of some six hundred cars and pick them out. Now the Government is trying to throw upon us the burden of assembling their evidence for them, that in the face of the fact that under the very terms of the contract we bought this fruit under specified that all we were required to do was to account for the sales made by the mortgagor, and not the sales by us. [127]

The Court: I don't have such a contract in evidence.

Mr. Sanders: Your Honor can understand why we couldn't have these records segregated to the "nth" degree, but this evidence to a large extent is available to the Government if the Government wishes to take and go thru these six hundred envelopes. But the Government says 'the burden is on you to go thru and pick out our evidence for us'. I submit its not fair. We thought the price and everything was agreed upon. The Government had plenty of men up there. Three different men—they took the witness stand and testified as to going over our records. We thought it was a closed incident as to what the prices were.

(Testimony of O. R. Barrett.)

The Court: We will adjourn to 9 o'clock tomorrow morning. I don't know now whether I will hold the Government or the defendant responsible for holding up the case, but you'd better work all night on it. I don't know which I am going to hold responsible for it. I don't see how you can operate a business, take property knowing there is a mortgage on it, and then operate your business so as to make it impossible for them or any one else to know what became of the mortgaged property. On the other hand I feel it is the responsibility on the part of the Farm Security Administration who went in there in May, 1938, to have done more than they did. I don't know how I am going to hold in the morning whose responsibility it is.

Whereupon Court adjourned to convene at 9 o'clock A. M. April 29, at which time, all parties present the trial proceeded. [128]

WITNESS O. R. BARRETT

resumes the stand for further direct examination.

By Mr. Erickson:

Q. Have you made further examination of the records with reference to the sale by the Pacific Fruit Company of apples raised upon the Brisky farm?

A. I did last night of all the records we have here.

Q. Will you give us a statement as to what you discovered last night in detail there.

A. Among the records we have here which is a

(Testimony of O. R. Barrett.)

fourth, or possibly twenty percent of the files from this pile we have something like seventeen cars I discovered last night. I understand from Mr. Nessen he discovered a couple more.

Q. Will you state the shipments you found last night, when the shipments were made.

A. Yes, I made a summary here of those—the first car is file 309, car 33729, shipped February 1, 1937.

Q. It would be 1938, wouldn't it.

A. I beg your pardon, '38 is correct. That particular car contained out of the 756 boxes, 48 extra fancy Delicious—150s, and generally we can identify it as being Mr. Brisky's fruit, the fruit bought from Mr. Brisky, I believe on January 8. I didn't have the ledger sheets which I think are in evidence now, or anything else that I could definitely identify them.

Q. That is, 48 boxes of Brisky fruit is all that was in that car.

A. All that was in that particular car—there were other growers fruit in the car, fruit bought from other growers. [129]

Q. And that fruit was shipped by the Pacific Fruit. A. That's right.

Q. And where was it shipped to?

A. I don't have that information here—its file 309—you have all the files there—I see it was shipped to D. L. Scotto & Co., New York City.

Q. Did the car entirely consist of extra fancy delicious?

(Testimony of O. R. Barrett.)

A. A straight car of Extra Fancy Delicious in sizes ranging from fifty six to a hundred and fifty.

Q. What was the purchase price per box?

A. Our purchase price?

Q. Yes—I mean the selling price you sold them for to Scotto and Company.

A. The car sold for 82½¢ less the brokerage.

Q. Per box? A. Per box.

Q. Now, do you have a record there of any other shipment of the Brisky fruit?

Q. (By Mr. Sanders) What were the sizes the Brisky fruit was in?

A. He had a fair range of sizes, the largest 88 and the smallest 150, which was about representative of the whole car.

Mr. Erickson: I think thats about all the information we want of that shipment.

Mr. Sanders: Just one more question—showing you plaintiff's exhibit 'd' can you identify those apples on plaintiff's Exhibit 'D'?

A. I think I can. There was a discrepancy between Jons and Delicious as has been disclosed before—I think the [130] only fruit we bought of Delicious that could possibly appear on there was either December 18 or January 8.

Q. Can you tell from Plaintiff's Exhibit 'D' what credit we gave Mr. Barrett for that fruit?

A. I think 97c.

Q. We sold for eighty two and a half.

(Testimony of O. R. Barrett.)

A. Thats correct.

Mr. Sanders: That's all.

Q. (Mr. Erickson) You aren't absolutely sure about that?

A. I can check very quickly—I don't think we bought any other delicious except that particular lot, so it would have to be—there was a confusion between Jons and Delicious——

Mr. Sanders: This will give it to you.

(Handing witness Plaintiff's Exhibit 'A'.)

A. January 8, 189 boxes of Delicious were purchased—I think thats the only purchase of Delicious we made from Mr. *Barrett*.

The Court: These forty eight boxes were out of that 189? A. It must have been.

Q. Now, about your next shipment of Brisky fruit.

A. File 329—car shipped on February 10, 1938, F.G.E. 52779—that car was a car of—half Wine-saps, and half Delicious—the car contained of the Brisky fruit, 26 boxes of Fancy Delicious, ranging in sizes from 125 to 150—the car was sold at the price of 75c on the Delicious less \$30.00 brokerage.

Q. To whom was that car sold? [131]

A. The invoice and the confirmation of sale indicates it was shipped to Jobbers Produce Company at Jackson, Mississippi.

The Court: I think you said \$30 the brokerage on his boxes would be—I didn't get it on file 309.

A. The approximate rate is almost uniformly

(Testimony of O. R. Barrett.)

\$30—this car was \$25 brokerage carried on different distances.

Q. That would be about three cents a box.

A. A little better than three cents a box.

Q. (By Mr. Sanders) Do you know how much we paid the grower for those apples?

The Court: They must have been the same apples out of the 189 Delicious.

Mr. Sanders: These were Fancys—were these the same price, 97c?

Witness: No, these were Fancys, the first car was Extra Fancy—77c for these.

Mr. Erickson: Per box, instead of 75c.

Mr. Sanders: We paid the grower 75c—75c is what we sold them for—less three cents brokerage.

Witness: I am sorry—its more than that. Its pretty hard to tell but I think we paid the grower—a flat price on 163s, and the regular 97c on the extra Fancys—and 77c on the Fancys.

The Court: You said 97 on the Extras and 77c on the Fancy?

A. On a range of sizes—that would include large and small ones, both.

The Court: You think you paid 97c for them. [132]

A. The fruit that went into this car would be the largest of the 77c fruit, I think, and would be more desirable and should get a better price—

The Court: When you bought them you actually paid 77c the closest you can come to it.

(Testimony of O. R. Barrett.)

A. Thats the closest I could come.

Mr. Erickson: Q. Referring to defendant's '1'—these are all listed as Jons but are really the Delicious sold on January 8th, aren't they—isn't it a matter of fact the Fancys were only credited 67c?

A. Yes, those—this shows 67c on 163—

Q. Its 67 instead of 77, isn't it?

A. On this sheet it is, yes. This is your audit.

Q. And taken from your books, though. That 77 was Extra Fancys.

A. On the small sizes that's probably true.

Q. So you really allowed the grower 67c instead of 77c. A. I think that is correct.

Q. Now do you have another shipment there that you can trace to Brisky fruit?

A. Yes—there is in file 370—FGE 19428, a car was shipped on March 2, 1938, presumably part of that January 8th—we sold to Atlantic Commission Company—Wenatchee—that car sold at 90c for—that was Extra Fancy—flat rate on all sizes—Mr. Brisky's fruit in that car was all 163s—just the one size—Delicious—

Mr. Sanders: What price did we pay Brisky for the 163 Extra Fancys? [133]

Mr. Erickson: How many boxes, first?

A. Six boxes in that car. The price on the extra Fancy—163s—97c.

Q. What was the brokerage price per box?

A. Three cents—no, pardon me—the Atlantic

(Testimony of O. R. Barrett.)

Commission Company I think was a cash price—no brokerage.

Q. Will you give us the next sale, then.

A. You have 309—312——

Q. We haven't 312——

A. 312—was a car of Romes—car of Fancy Romes, sizes ranging from 138 to 188—that combines large and small—five tiers and larger—this car was sold to Richard Ernest Moser for export to Hamburg, Germany. It was sold at a price of 65c straight thru—and we were obliged to pay the charges for getting it to Seattle—freight \$78.59—the net proceeds that we obtained for the car was \$389.80—I see it has been computed here—its a little less than 52c a box on the 756 box average.

The Court: How much of Brisky's fruit was in that car?

A. In that car was 46 boxes of Romes of Mr. Brisky.

Q. (Erickson) What was the date of shipment?

A. February 10, the date of shipment. The sizes ranged from 138 to 163—15 boxes of 163s in the car—a 163 Rome is a small Rome and less desirable, of course, than the other.

Q. There was no brokerage on that sale, was there? A. No, no brokerage.

Q. What was your next shipment?

A. There was quite a few small amounts—3—6—5 [134] and 7—I was trying to select some larg-

(Testimony of O. R. Barrett.)

er ones here—shall I take them in the order in which they come?

Q. Yes.

A. The next car is file 368—shipped on March 2—3 'C' grade Delicious—this was a car of what we call 'chop suey' car, sold to Johnson Fruit Company, Hastings, Nebraska. Contained 175 Romes, 252 Stamens—160 'C' grade Winsaps. The car sold at a flat price on all varieties, grades and sizes at 45c—total proceeds, \$339.35. I haven't computed that—we couldn't segregate the sizes—all we could do was to tell the price we sold it at which was 45c a box regardless of size, variety or grade.

The Court: That was net to you?

A. Yes, that was net to us. Yes that was net—with the exception of a small item of 85c for exchange.

Q. (Sanders) The fruit Brisky had in that lot was low grade Jons or Delicious?

A. 'C' grade—Delicious and small size—163 size.

Q. How would that compare with the other varieties that went in the car—would that be as good a grade—would it be the best that was in the car, the worst, or half way between?

A. I would say that was the poorest quality of anything in the car.

Q. So the fruit of Briskys that went in that car was the poorest of the lot?

A. I would say the three boxes were.

(Testimony of O. R. Barrett.)

Q. How much did we pay Brisky for that 'C' Delicious?

A. As near as I can tell—47c—it appears here.

[135]

Q. And we sold them for how much?

A. Forty five cents on the average of the car.

Mr. Sanders: That's all I have on that car.

Mr. Erickson: Now, the next sale.

A. File 371—shipped March 2d, contained five Fancy Romes we bought from Mr. Brisky—the sizes were 113 and 125, average size Rome—the car was made up of Delicious, Romes and Wine-saps—the Romes in the car were sold at 50c—

Q. Any brokerage on that?

A. No, this car was sold to the Atlantic Commission Company at a cash price.

Q. The next one.

A. File 378—shipped March 5th—7 'C' grade Delicious—the car sold at 42½c less the brokerage.

Q. How much was the brokerage?

A. Brokerage of \$30 on that car.

The Court: About how much a box?

A. 3.8 or three and three-fourths cents.

Q. To whom was that car sold?

A. Atlantic Commission Company—John Vennura & Sons, New Orleans. File 379 is the next one. Car shipped on March 5th—contained 12 extra Fancy Delicious—163 small size, bought from Mr. Brisky—that car sold at a net price of 70c—the customer was the Atlantic Commission Company.

(Testimony of O. R. Barrett.)

Q. (Sanders) How much did we pay Brisky for those 12 boxes?

A. 97c I think—it was the poorest of the 97c—they were purchased at 97 for a range of sizes—163s. File 392, shipped on March 12. That car contained 8 Fancy [136] Delicious of medium size—113—125s—it was sold at 55c net straight thru on all sizes. The customer was the Wesco Foods Company. The next file is 390—contained two boxes of Fancy Saps, large size—shipped on March 10th—just two boxes in that car—one was size 88, which is the largest size, and the other 96. The price, 65c on all the Saps in the car.

Mr. Sanders: YTK was the price we sold at.

A. Yes, the price we sold at. There was about fifteen different varieties and grades.

Q. What did we pay for those Saps?

A. We bought them from Mr. Brisky January 8th—Saps—163s and larger at 80c—

Mr. Erickson: Thats for the extra Fancys, isn't it?

A. Wait a minute. These are the two Fancys—for the Fancy Saps on this statement was 65c for the large.

Mr. Erickson: Any brokerage on that?

A. No. This car was shipped to the Ryan Fruit Company in Butte, cash price—no brokerage. Then file 419—this car contained four extra Saps, shipped March 24—sizes 163—all 163—fruit was shipped in a car of all sizes at an average price of 70c, less brokerage of \$31.50.

(Testimony of O. R. Barrett.)

The Court: How did these four boxes compare in value to the average in the car?

A. Its about the average size—mostly 163s in the cars.

Mr. Sanders: How much did we pay Brisky for those four extra Fancy and larger—small 163s and larger?

A. We bought at 80c, the next smaller size at 75c [137] and the smallest at 65c. The next is file 435. Contained 11 Extra Delicious, shipped on April 13—car was 163s and smaller—Mr. Brisky's fruit in that car was 11 boxes—6 boxes 188s and five boxes 198s. The price the car sold for 75c net——

Mr. Erickson: Any brokerage on that?

A. No brokerage.

Mr. Sanders: That fruit cost us according to plaintiff's Exhibit 'D' 77 cts.

A. Yes, 77c.

The Court: The Brisky boxes were the smaller?

A. Yes, they were the smaller. 188 and 198. Thats about the smallest we ship ordinarily. Then file 445—this is the one I think Mr. Nessen discovered last night. I haven't had a chance to check it. I will see. This contained 25 boxes of Fancy Delicious—12 188s, 2 198s and 11 216s. That's very small. The car sold at 60c—less the brokerage of \$25. Fancy Delicious, I believe 175—216—bought from Mr. Brisky for 57c.

(Testimony of O. R. Barrett.)

Mr. Erickson: What is the date of shipment on that car?

A. April 20th. Shipped to Rubin Produce Company, Chicago. File 375—shipped March 3rd—contains 30 Extra Fancys Romes—150s and larger—car sold for 65c—net—Mr. Brisky had thirty boxes in that car.

Q. To whom was that sold?

A. Sold to Scott's Bluff, Nebraska—that's a branch.

Q. Branch of the Pacific Fruit?

A. Yes. [138]

Q. The price you allowed the dealer was 42c.

A. On the 150 Romes, 42c.

Q. Of course you have no record showing who the Scott's Bluff, Nebraska branch sold them to?

A. No.

Q. Have you any other file?

A. Did you get 361?

Mr. Sanders: No.

A. How about 361 and 370?

The Court: We have 370, not 361.

A. I must have missed 370—I found a couple more—361 was shipped on February 26, contained 14 Extra Delicious—163s and larger—sold for a dollar less brokerage of \$30.00. The customer was Shamrock Produce Company at Shamrock, Texas. The price to the grower would be that same 97c. I think that is all except Mr. Nessen said he had three files he found last night, and I have one of

(Testimony of O. R. Barrett.)

them. This was a truck shipped to the Coast, shipped on March 16th, truck No. 154—truck contained 698 boxes which was a full car load—of all fruit—the way we distinguish this one is from the Code—some Fancy Jons—21 lugs—notation on the inspection report is ‘good color’. We probably put them up ourselves in our warehouse. If it was some Jons bought in bulk that would account for that. This car was made up of all—a chop suey car—its not apparent from the file what those brought here—very likely we turned them over to our house in Seattle to handle and they did the best they could with them.

Q. There is no selling price disclosed? [139]

A. No.

The Court: How many boxes of Briskys?

A. This also shows 21 lugs—Brisky—very likely loose in the box. There should be one more that Mr. Nessen found.

Q. (Mr. Erickson) This is the one you testified to 30 boxes January 22, 1938?

A. Yes, this is the one we found—this is a car shipped on January 22d—

The Court: What is the file number on that?

A. 274—the complete file isn’t here—the invoice is missing—we had it here yesterday.

Mr. Erickson: Do you have any more records there of the disposition of the Brisky fruit, or is that all you have? A. All we have.

Q. Where are the rest of the files?

(Testimony of O. R. Barrett.)

A. They would be in the files at Cashmere.

Q. You didn't bring those up?

A. No, I think there were possibly six or eight boxes. Mr. Sanders checked that over Sunday. He brought one box. These were typical cases.

Mr. Sanders: You were not present at the time Mr. Raines and I made a search thru the files.

A. No.

Q. You haven't accounted for any sales that were made during 1937, in October, November or December—you accounted for no sales made up until January 22, 1938, have you?

A. January 22d, I think was the first. [140]

Q. That was the first tracing of the Brisky fruit you have made.

A. Of this fruit, yes. I am inclined to believe very little was shipped before this group of files because this is representative of all the Delicious, or most of them. Before that we thought the market was going to be higher and guessed wrong.

Q. As a matter of fact all the sales made in October, November and December were made at a higher price than those made in February and March.

Mr. Sanders: I must object to that. There is not a syntilla of evidence that we had any of Mr. Brisky's fruit available for sale during the period he mentions. The record before the Court at the present time shows in October we bought 10 F & F Jons, in November we bought some bulk Spitz, and

(Testimony of O. R. Barrett.)

November 26 we bought fourteen boxes of Extra Fancy Romes. Thats all of the Brisky fruit we had prior to December 18th, so the question as to what the market price on this fruit was back in October and November and prior to our dealings with the Briskys is absolutely immaterial. The record shows that is the situation.

The Court: What have you to say to that, Mr. Erickson?

Mr. Erickson: Well, we haven't yet accepted the data as to the dates the fruit was purchased from Mr. Brisky. The evidence isn't too clear as to just when that did take place. The purpose of the question is to show the general decline in the market.

The Court: The objection is sustained. [141]

Mr. Erickson: Then I will ask the Court if a question is proper based on their own figures—if I reframe the question in regard to the dates as set forth in their own figures.

The Court: You mean after the 18th of December——

Mr. Erickson: After the purchase dates here—I believe there are some in November—they say they made some purchases in the month of November.

Mr. Sanders: We purchased 68 boxes of bulk Spitz and 14 boxes of Romes—thats all we bought in November.

The Court: I will let you prove the market value of the apples purchased or delivered from

(Testimony of O. R. Barrett.)

Mr. Brisky a week after they were purchased in each instance—I don't know as I will ever consider the testimony but I want to get in the whole picture—whether or not that makes up the picture from what you think you can show. But I don't think you can prove generally a declining market.

Mr. Sanders: (To witness) At the time the auditors came in to check the records all of these various files were available at that time?

A. Yes, they were.

Q. Approximately how many boxes of apples did the Cashmere branch handle that year?

A. That would be about six to eight hundred carloads—not all apples—there were some pears and other things.

Q. You have handled that many each year subsequently?

A. I think it would average pretty well.

Q. So there have been approximately 500 cars per year passed thru there since these records were current. [142]

A. Yes—thats five years ago.

Mr. Erickson: I will ask you to state whether or not the market declined between December 18th—

Mr. Sanders: One week would make it December 25th—

Q. —December 25th—between that time and January 22d.

Mr. Sanders: I object to that on the ground its immaterial—there is absolutely not a syntilla

(Testimony of O. R. Barrett.)

of evidence before this Court that during that period we converted any of these apples. The evidence shows that had the Government used ordinary diligence they could have had all of this data—they sent three men into our office—the records were all there—now, years later, they put the burden on us to furnish their evidence, when, if they had wanted to know what happened to those cars when the files were current files—the three men could have had it. I submit the Government hasn't shown any degree of diligence in preparing its case.

The Court: Now, on the general objection I am going to overrule it. I want to get as much of this picture as I can. I don't know how much I will consider it, but would like to get, if possible—maybe this witness does not know—if there was a fluctuation in price did that affect the different grades of apples or different kinds of apples uniformly?

A. Well, no, it would never do that. However, as I recall that was a disastrous year—there was a difference of opinion among the shippers about the Holidays as to whether the market was going to be strong, or not. But I think around the Holidays, or shortly afterward most of the shippers [143] gave up hope. I think about January 8th was the last date we had any optimism.

Q. Now, on December 18th what did you buy?

(Testimony of O. R. Barrett.)

A. The big bulk of the Jons—250 Extra Fancy—23 Fancy and 93 Fancy——

Q. Is it possible to tell what the market on that type of apple was a week afterward?

A. I think we could get an idea from our files—however I think it is apparent we buy a lot of fruit in bulk—I think we are, possibly, the only ones that do in the district—to take care of these small branches of ours—like at Hoquiam where they have a lumber camp nearby and want a certain type of cheap quality. We do a lot of that. It really aids the grower in disposing of a lot of fruit he couldn't market to high class trade—and a good portion of that it would be impossible to tell where we bought that particular lot of fruit. I don't know the quality—Mr. Cochran bought it; I believe he did business with Mr. Brisky for years—I am not familiar with the Brisky orchard. I would say we have a lot of growers we are able to market their crop when very few other dealers can.

The Court: Its not so much a matter of what the Pacific Produce Company did, but was there a market price. Mr. Phipps started yesterday to testify as to the market price on such and such a date——

A. I am not a marketing agent, although I have been a salesman. Anything as perishable as a box of apples there is no such thing as a definite market price on any [144] one day even. When it comes to grades and varieties and sizes that is

(Testimony of O. R. Barrett.)

about as close as you can standardize it. Then when it comes to condition—when you come to color—some orchards have an inherent weakness—perhaps just show a lighter calix—something inherent in the apple—nothing that will hurt the apple—a lot of markets choose that stuff because they can get it from five to ten cents a box cheaper—we do a lot of that business because a lot of our branches in areas where they supply lumber camps, to them whether an apple has any particular color or sting or two would be immaterial. We can buy cheaper and sell cheaper and make a margin of profit. You can't standardize the price, even on standard varieties. There might be a variation of ten to fifteen to twenty cents a box, that is, the same day, among shippers—I might sell a car of fruit and get \$1.20 down in Birmingham, Alabama, because there was a dealer down there said he was willing to pay that——

The Court: The effect of your answer is you can't answer the question.

A. You can't determine the markets, no. Nobody can.

Mr. Erickson: Q. The apples were cheaper as a general rule in January, February and March than they were in the month of December?

A. I don't think there is any question about that—it was steadily declining all season—the latter end of the season it was terrible.

Q. You, in your computation here I think have

(Testimony of O. R. Barrett.)

accounted for the shipping of 90 to 91 boxes of Extra Fancy Delicious— [145] in your report to Mr. Brisky you have only reported here receipt of 47 boxes, have you not (referring to Defendant's '1') under January 8?

A. You are attempting to check the accounting troubles between the Pacific and the farmer?

Q. Yes, that is what I am trying to find out.

A. I assumed they would check that immediately. Mr. Brisky gets his statement and so does the Farm Security Administration. These figures were taken by the Farm Security Administration auditors.

Q. Mr. Barrett, referring to Plaintiff's Exhibit 'D' on January 8th, 1938, your records show a purchase of 47 Extra Fancy Jons, 163s and larger—97c—that was 47 Delicious, was it not?

A. I presume so from what has been brought out here.

Q. Also on the same date 45 Extra Fancy Jons—145-216—67c—

A. All of those 67 items are broken down apparently between Jons and Delicious.

Q. There is a difference in price given Brisky of 20c between 163 and larger and smaller sizes—between 77c and 97c.

A. On account of size. Usually twenty to twenty five cents difference between five tier apples and the larger tiers. That's what that indicates.

Q. So that in your accounting on sales this

(Testimony of O. R. Barrett.)

morning you showed 90 boxes of 163s and larger sold from Mr. Brisky and on this ticket it only shows a receipt of 47 boxes in all from him. [146]

A. This thing is obviously wrong as between Delicious—this undoubtedly was all one transaction. This is an error on this form and has nothing to do with our records. Our own records in the office—in the ledger sheets would be the correct records.

Q. You think that isn't a correct record?

A. I know this isn't when it comes to the Delicious.

The Court: Will the Brisky sheets at the office show me what your records actually show?

A. He gets a copy of all of these tickets involved in this—all the growers do—if he has those they should correspond with our records and show all the details. Mr. Sanders and Mr. Raines had spent I think most of the day Sunday looking for these things. When it comes to storage tickets five years old its our policy to destroy them after about two years to conserve space. They pile up. I went up there a few minutes Sunday and there were dozens of boxes. I think they made a pretty thoro search and they had been destroyed.

The Court: From plaintiff's Exhibit 'B' I can get what information I need.

Witness: That coupled with the items in the ledger should coincide with these items. These figures were taken by the resettlement auditors di-

(Testimony of O. R. Barrett.)

rectly I believe from our records—our copies of the receipts given and all the details they regarded as necessary.

Mr. Erickson: Referring to Exhibit 'A' this item marked January 8, 1942, ticket No. 12442, 189 Delicious—92 X F 83 Fcy—14C—less adv. Stg.—that was the net [147] price quoted to the grower.

A. That would be broken down on the tickets from which you got your records. This bracket indicates the original records from which you got your tickets.

Q. You have the ticket 12442 in Court?

A. No, we couldn't find any of those tickets of that age. Isn't that true, Mr. Sanders?

Mr. Sanders: I believe so. We have a lot of things here but I don't believe that is among them. At least I couldn't locate them.

Q. You would say this would be the net price less storage and advertising—this price quoted here—\$135.64.

A. I don't get the distinction between gross price and net price that has been discussed here. We just have one price. The price we pay the grower.

Q. How do you explain 'advertising'—

A. We act as collection agent for the advertising department and take one cent from the grower and then turn it over at the end of the season.

Q. How do you explain 'less storage'?

A. Now it could be possible here if Mr. Cochran

(Testimony of O. R. Barrett.)

had a block of fruit that had been packed out for Brisky and Mr. Brisky didn't know whether he wanted to hold it or sell it to us—well, we might have to shift it around two or three times—and we might make a warehouse charge for leaving it on the floor—changing his mind——

Q. You don't think this has anything to do——

A. I think its probably for shifting the fruit [148] around in the warehouse.

Q. Wouldn't you think that would show in your books when it says 'less advertising and storage.'

A. For years 'warehousing' just means extra work around the warehouse.

Q. That price you quote there is the price after you deducted storage.

A. I don't know what you call 'deducted.'

Q. I mean this item here of \$135.64 is the amount you allowed Mr. Brisky after making some deductions for storage.

A. No, only the agreed price between Mr. Cochran and Mr. Brisky that day. What factors they considered in determining that price, I don't know.

Q. If there were no deductions for storage it would be in excess of \$135.64—wouldn't it?

Mr. Sanders: I think your Honor he is getting into a great deal of speculation. Here are two men, Mr. Brisky and Mr. Cochran—they get together and strike a bargain. What they talked about as they went along was unknown to some

(Testimony of O. R. Barrett.)

bookkeeper who posts an entry on there—Why didn't he bring Mr. Cochran into Court who actually handled the transaction. The whole Government's theory is its up to us to furnish the records.

Mr. Erickson: I subpoenaed your records and the men who knew about the records. I didn't know who they were.

The Court: He has been asked two or three times and says he doesn't know. [149]

Q. You don't have the records here then to show the disposition of the other part of that 1057 boxes, do you? A. Not here.

Q. Those records are available at Cashmere?

A. Yes. We don't destroy car files—we keep them from year to year.

Mr. Erickson: At this time I would like to make a demand those records be produced in Court.

Mr. Sanders: In that connection I better be sworn in regard to that demand. If the Court will take my oral statement without oath. That subpoena was served on us on Saturday evening. I, personally, and the manager went up there Sunday hunting records—piles and piles of boxes there. There were records there of some 2500 cars since this business, and how many before I don't know. We spent that much time in endeavoring to do it, and these are all the files we could find. I was back up there again Monday and hunting records, and this is all we were able to get in the

(Testimony of O. R. Barrett.)

limited time. And I submit for Counsel at this stage of the proceedings to come in and make a demand is absolutely unreasonable. This case has been set for months. He had all the opportunity in the world to do it, and he can't come in at this late date and serve a subpoena that is humanly and physically impossible to comply with.

Mr. Erickson: I wish to make this statement. I talked to Mr. Sanders on the 15th of April and told him exactly what we wanted to have for this case and that a subpoena would be prepared and served— [150]

(Discussion.)

The Court: You can't make a demand like this binding on anybody. You can't issue a subpoena saying 'bring in all your records'. There is some responsibility on people starting law suits to know what they want. I will refuse the demand on the ground it wasn't made timely.

Have you any idea, Mr. Barrett, what percentage—you have given us 298 out of 1057 boxes—of the 298 two of the shipments, including 44 boxes, are to your branches. I assume it is a fact it is more difficult for you to find the other files what you haven't produced. Mr. Sanders wasn't able to find in a couple of days due to the fact those shipments were probably made to your branches—

Mr. Witness: Thats probably true. I don't give the same care to the branches I would to any borrower.

(Testimony of O. R. Barrett.)

The Court: What percentage of your business is done with the borrowers—have you ever figured it up?

A. It varies generally with the season. Take the condition that exists here. Our manager's function is to give our wholesale houses all over the country good service—to see he has enough fruit on hand and the type he knows the different communities use. It will vary with the seasons and the varying conditions.

The Court: Well, what percentage?

A. Taking the community as a whole and our shipping branches at that time—Wenatchee, Cashmere, Dryden, Chelan, Yakima, Buena, I would say roughly—lumping the whole business, perhaps about 75% of our volume even in a poor year like this would be for the branches. That's what we [151] build our warehouses for and operate them. During the past three or four months I will say our Yakima house, for example, has not done 5% of the business outside of the organization. The market right now is firm on apples and our branches are taking all, and as a result we are not selling to outsiders—we sell the fruit for our own branches.

Mr. Erickson: I think that's all.

Mr. Sanders: No questions.

B. R. PHIPPS,

recalled, testified as follows:

Q. Mr. Phipps, directing your attention to about the 18th day of December, 1937, state whether or not you were acquainted with the market price in the community of Wenatchee of Jons, Extra Fancy, 163s and larger.

A. I was acquainted with the record available to me, yes.

Q. Were you personally acquainted and knew the market price? A. Yes.

Q. State what the market price per box was on December 18, 1937, of Extra Fancy, Jons, 163s and larger.

Mr. Sanders: If your Honor please, I wish to object on two grounds, first, there is not a syntilla of evidence before this Court that we converted any of the fruit at that time. That was the date on which we bought the fruit from the farmer, and not the date on which we sold it. The Government has shown an absolute disregard for an effort to obtain the information in regard to the time we did convert the fruit. The time we converted the fruit [152] according to our statement and according to the Court's ruling was the time the fruit lost its identity and being shipped out in a car—that is the rule the court has laid down. I wish also to add its immaterial, and I wish also to further object unless the witness can testify that the fruit, the condition of the fruit, considering its defects and one

(Testimony of B. R. Phipps.)

thing and another, was identical with our fruit, then the evidence is absolutely worthless. Because somebody sold some fruit at a particular date at a particular value that is not evidence of any value as to what another particular lot of a commodity that is perishable as apples are.

Judge Schwellenbach: Overrule the objection. The question is—what was the market value for the week following December 18th—not on December 18th.

Mr. Sanders: May we have an objection to all of this testimony without interrupting each time?

Judge Schwellenbach: Yes—. My theory, Mr. Sanders, is if you were ultimately responsible for the fact it is impossible to prove the market value because of the fact you took the fruit which you converted and shipped it would to—what is it—90 different branch houses around the United States—the rule in reference to conversion of stock where the measure of damages is the market value between the time they got the stock and a reasonable time afterward, within which plaintiff can make demand for return of the stock, the Court has held a week or ten days is a reasonable time. The rule may be completely negatived in this case by other [153] factors but I want that testimony in—what the market value is within a week after the car sales. I may not pay any attention to it, but I want the opportunity of hearing it. I will overrule the objection. Your objection may go to all of this testimony.

(Testimony of B. R. Phipps.)

Q. Will you state what the market value was the week following December 18, 1937?

A. That would be the week of December 17 to 25—am I right on that?

Judge Schwellenbach: The 18th to the 25th.

A. Well, the market at that time in Seattle was \$1.00 to \$1.25.

Q. I mean Wenatchee—the market price in Wenatchee.

The Court: These are on Jonathans.

A. Extra Fancy, yes sir.

Q. 163s and larger.

A. I don't happen to know of that, Mr. Erickson. I have knowledge of the Seattle market.

Q. Well, what was the freight rate?

A. 11½ cents.

Mr. Sanders: I submit the Seattle market has nothing whatever to do with this. I submit the Government certainly must produce some proper evidence and he can't quote the market in Seattle or Timbuctoo, or some other place—we are here in Wenatchee.

Q. Do you know from your independent recollection what the price was in Wenatchee?

The Court: I will sustain the objection. He qualified himself yesterday not as a dealer in apples but because [154] of servicing a large number of loans in the Wenatchee Valley and as a result of that he kept track of what the market price was in Wenatchee. I sustained the objection on the ground he wasn't qualified.

(Testimony of B. R. Phipps.)

Q. Well, the week of December 18 to 25—1937—in size 175-216—were you acquainted with the market value Extra Fancy Jons in Wenatchee?

Mr. Sanders: I think this witness has already disclosed the fact his information was on the Seattle market, and not Wenatchee.

The Court: Did he answer it—I think he said he didn't know.

Mr. Erickson: I am asking him on this smaller size. A. It would be 70c.

The Court: How did you get that information?

A. From the Bureau of Agricultural Economy.

The Court: As to the price in Wenatchee?

Witness: Taking it from the shipping records. Those were the records available to me at that time.

The Court: I will sustain the objection.

Mr. Erickson: May I ask the witness a few questions on voir dire—I don't believe he understands.

The Court: He says he gets it from something the Department of Agriculture sends him—I can get it the same as he did.

Mr. Erickson: I would like permission to ask the witness a few questions on voir dire as to his independent knowledge and refreshing his memory from a few sheets he has there. This was five years ago and obviously the witness [155] can't testify without something to refresh his memory five years back.

(Testimony of B. R. Phipps.)

The Court: I realize that. The Government can't send this man a statement and then the Government use him as an expert testifying from a statement the Government sent.

Mr. Erickson: I thoroly realize that.

The Court: Go ahead and ask him some questions.

Q. (By Mr. Erickson): Mr. Phipps, what were your duties in Wenatchee in the 1937-38 marketing season?

A. My duties were to work with the grower from the standpoint of seeing how their fruit was sold—where it was sold—the standpoint of seeing the fruit was properly accounted for and the basis of the sales that were made.

Q. Did you likewise visit the grower and the warehouse and confer with them from time to time in regard to the apples and the selling prices and so forth? A. Yes.

Q. State whether or not you contacted the Farm Security Administration from time to time in Portland, Oregon, and reported the results of your conferences in Wenatchee. A. Thats true.

Q. During that particular time, that marketing season, were you acquainted—your own knowledge of the market price on certain qualities, varities and size of apples?

A. Yes, I had to be.

Q. You don't remember that price now on a particular date?

(Testimony of B. R. Phipps.)

A. No, only as I refresh my memory from records I have. [156] I couldn't recall the statements that were given to me on the accounts so far as prices that were received.

Q. If you were asked what the price of apples would be here in court on a particular time in 1937 what would you base your statement as to the price upon?

A. It would be only on the records—I can't go back to the time of the sales and recall the definite sale prices. That far back it is impossible. The only manner in which I could do it would be some of the records that were used in the office and the sales information available to me.

Q. At the dates during that year, state whether or not——

Mr. Sanders: Just a minute—ask him what he received—don't tell him what he received.

Q. What did you receive having to do with the price of apples from day to day during the 1937 market season?

A. We received reports there with regard to shipments of fruit.

Q. And state whether or not those reports correctly and accurately stated the market price.

A. We considered it the market price.

Q. You considered those reports stated the market price? A. Yes.

Q. By referring to certain memoranda that you have you may state whether or not you would or

(Testimony of B. R. Phipps.)

would not be able to correctly testify as to the market price on a particular date for the 1937 marketing season. [157]

A. I could within a week of the dates on either side.

The Court: Why do you say a week?

A. Because I have my sales information based on the record I had at those particular times.

The Court: Are these sources of information from various growers?

A. This is a record of sales that were made that I refreshed my memory from—sales information I took at the time the records were available to me.

Q. Where did you get them from?

A. One source of information I had was the Bureau of Agricultural Economy reports what came to our office each day. We followed the Seattle and Wenatchee markets so far as sales were concerned, using that as a basis for sales. That was one source of information we had. We didn't have time to go around and contact each warehouse each day.

Q. (By Mr. Erickson): State the extent to which the fruit industry used these same reports.

A. We had some three hundred growers and had to follow the markets in a general way with what contacts we could make with the warehouses themselves.

Mr. Erickson: Mr. Kaseberg would like to ask a question.

(Testimony of B. R. Phipps.)

The Court: Any objection?

Mr. Sanders: No.

Q. (By Mr. Kaseberg): (I would like to ask one or two preliminary questions. I merely want to summarize what this witness has already testified to.) You testified that in this particular week from December 18 to the 25th [158] that you were acquainted with the market price of fruit in Wenatchee. A. Yes.

Q. You testified you have received daily from the Bureau of Agricultural Economy of the Department of Agriculture the marketing service reports—reporting sales. A. That's right.

Q. Those were received from day to day?

A. Yes.

Q. State whether or not at the present time you have an independent recollection of the market value of the fruit of the size pronounced in the previous questions during that week. A. No.

Q. You have no such recollection—I hand you plaintiff's Exhibit 'F' for identification and ask you whether or not those are the copies of the sheets you received from the marketing service maintained by the Bureau of Economy.

A. They are the same.

Q. I will ask you whether or not at the time you received those marketing sheets they set forth the market value of the fruit on the respective days therein according to your own personal knowledge at that time?

A. To the best of my recollection they did.

(Testimony of B. R. Phipps.)

Mr. Kaseberg: If the Court please, the plaintiff offers them in evidence. If the witness knows at a time in the past that the memoranda sets forth the correct statement of what he knew of his own independent knowledge and at a said date—he might not have that independent [159] recollection but can testify as he has done, that the document which he knew at that time set forth a written memoranda of what he knew to be from his own knowledge to be correct then the written memoranda itself is admissible in evidence.

Mr. Sanders: I wish to object on the ground it is not proper evidence as the witness has testified the knowledge he had he got from this. Now this is the very thing gotten out by the Government, and he testified he didn't have time to go around and contact the growers and warehouses—his knowledge was obtained from this—. As your Honor has said—you can pick this up and be as good an expert as he is, and I submit that is not the way to prove market price. I submit this is not admissible.

(Discussion.)

Judge Schwellenbach: It seems to me with all the facilities of the United States Government in preparing this case for trial over a period of two or three years they could have gotten somebody in Wenatchee qualified to testify from his knowledge what the market price was at that time. When you get down to it all this witness has testified is what he has taken off these reports.

(Testimony of B. R. Phipps.)

Mr. Kaseberg: No, your Honor—he is testifying that on that particular date in question this was a written memorandum of the price he knew to be the market price of his own knowledge on that date—

Mr. Sanders: He knew—the reason he knew it was the market price was because he read it on that sheet.

Mr. Kaseberg: No, that isn't the truth. [160]

The Court: Where does it show Wenatchee?

Mr. Kaseberg: Near the bottom of the first sheet—

The Court: If Counsel wants to come in for a minute I will say frankly I want to see what Mr. Wigmore has to say about this problem.

Whereupon Court recessed, after which time, all parties present, the trial proceeded.

Mr. Phipps resumes stand.

Q. (Mr. Erickson): Mr. Phipps, we were speaking about plaintiff's Exhibit for identification, I believe its No. 'F'—will you state again just what that exhibit purports to be or what that exhibit is.

A. Its a report on prices of shipments of fruit out of the Wenatchee area on given days.

Q. State the extent of its use by the people engaged in the fruit business in Wenatchee.

A. Well, its available to the growers or any one that happens to request the information.

Q. State the extent of its use.

(Testimony of B. R. Phipps.)

A. Its used as a report—it gives the basis of the sales made.

Mr. Sanders: Thats not answering the question.

Mr. Erickson: Maybe I am not clear.

The Court: To what extent is this report used in the Wenatchee area?

A. I don't know how much its used. Its there—if that is what you have reference to.

Mr. Erickson: Explain as much as you can about the use of that report. [161]

Mr. Sanders: What you actually know of its use. Not who could use it but who actually was using it, if you know.

A. Well, the growers use it as a basis for having some information on sales.

Q. State whether or not its used by the warehouses.

Mr. Sanders: I submit now he is getting around to the point where he is asking leading questions. I think its perfectly obvious this witness doesn't know.

Mr. Erickson: He can say he doesn't know.

The Court: State the extent to which its being used by the warehouses.

A. I don't know that it is used by the warehouses. Its available to them.

Q. State the extent to which it is used by brokers and other dealers.

Mr. Sanders: I think he should be asked whether he knows whether brokers use it.

(Testimony of B. R. Phipps.)

A. To the best of my knowledge I believe they do.

Mr. Sanders: I move the answer be stricken.

The Court: The question is the extent to which it is relied upon and proved worthy of reliance in the community. What do you know about that, Mr. Phipps?

A. I am not qualified to say just how much it is used, I don't believe.

Mr. Erickson: State the extent to which you used it.

Mr. Sanders: Your Honor, I think the answer settled the whole score.

The Court: He said he wasn't qualified to answer the question. [162]

Mr. Erickson: I submit the witness doesn't seem to be qualified. I am frank in stating to the Court I don't believe from his answer he is qualified to state the extent of the use of that report in the community of Wenatchee, therefore I take it he should not be permitted to answer any further questions to do with the market price. I would like to call Mr. Raines and see to what extent he uses this report in the Pacific Fruit, if he knows anything about it.

(Witness excused.)

The Court: Mr. Raines, come forward.

C. D. RAINES,

recalled.

Mr. Erickson: Q. Mr. Raines, referring to plaintiff's exhibit for identification No. 'F' U. S. Department of Agriculture, Bureau of Economy, reports, did you use those in 1937 and '38?

A. No sir.

Q. Are you familiar with those reports to any extent or used them to any extent?

A. They have no value.

Q. If you haven't used them you don't know what value they have.

A. I have seen them. We get them.

Mr. Erickson: All right. That's all. [163]

MERLE F. SHONS,

a witness called for and on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct Examination

By Mr. Erickson:

Q. Referring you to this plaintiff's No. 'F' for identification, are you familiar with that report?

A. I am familiar with it. However we don't take it any more. We have taken it.

Q. Did you use it in 1937 and 38?

A. No, I didn't.

(Witness excused.)

Mr. Erickson: We haven't any testimony here to sustain this report. That is all. The only theory we can offer this on would be if it was known to Mr. Phipps to be correct at the time he received it, and went over it from day to day, Mr. Phipps being acquainted with the marketing of fruit in the community.

The Court: He didn't answer that question. He said to the best of his recollection it was correct. I think it is better to stick to the standard Mr. Wigmore lays down that such reports are admissible if there is testimony to show they are generally relied upon on the basis of sales. We have had no testimony on that point.

Mr. Erickson: That is our case. We will withdraw Identification 'F'.

(Whereupon Court adjourned to 1:30 P.M. at which time, all parties present the trial proceeded as follows:) [164]

Mr. Erickson: May it please the Court, due to the unforeseen shape the testimony for the Government has taken due to the fact that we are unable to bring certain other witness here at this time I move the Court for a voluntary non-suit at this time.

The Court: This is my first experience with that under these rules.

Mr. Erickson: I understand I will have to file a Motion in writing, but have just been considering it during the noon hour, and talking to Mr. Kaseberg about it, and in as much as this is a test

case I don't think the shape the testimony has taken that your Honor will be able to arrive at a formula.

Mr. Sanders: You mean to dismiss the entire suit?

Mr. Erickson: With the privilege of *case* at another term of Court.

Mr. Sanders: I am not familiar with the Federal rule on non-suit. If its like the State Court—in the State court you have to start a fresh suit against us.

The Court: Yes, you have to dismiss your whole case. This is the rule. Rule 41. (The Court reads rule 41 on Dismissal of Actions.)

Mr. Sanders: I take it is discretionary with the Court to grant it or not. He has no absolute right to dismiss at this stage of the proceedings. Its a matter discretionary with the Court on such terms as the Court shall provide. [165]

The Court: Yes.

Mr. Sanders: Frankly, your Honor, I don't believe after putting us to the expense in this matter—coming over here and then in the way they have shown their diligence I don't think the Court should grant it. I don't believe they have made out a case. I think the case should be dismissed with prejudice because they haven't shown any type of diligence from one end to the other.

Mr. Erickson: The testimony on behalf of the Government's witness, Mr. Phipps, was a surprise to the Government—that he was unable to qualify

as an auditor on market values, and without his testimony it would be impossible to give the Court a basis for computation of these accounts, and there has been no lack of diligence on the part of the Government. This is merely one of the things that might come up in any law suit—a condition such as this—without any one being able to foresee just exactly how it was going to come up.

Mr. Sanders: I don't think Counsel has a right to be surprised at the testimony of one of its employees. I think with any degree of diligence at all—if this were a witness they subpoenaed from some outside source there might be a basis for raising a question. It's the Government's own employee, and the man that had to do with this from its very inception. At this time I move for a dismissal with prejudice. I feel the Government has had every opportunity—they have put us to tremendous expense and haven't even made an effort [166] to prepare their case. Right from the very beginning they have done nothing to prepare the case except to see that we come over here and bring all the evidence.

The Court: I wouldn't consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another law suit until the Government has paid something——

Mr. Connelly: May I address the Court: Your Honor knows, of course, how very recently my appointment to the office of the United States District

Attorney has been. I had just a brief opportunity to discuss this matter with the men in the office. I knew the legal department of the Farm Commodity Corporation had something to do with it. There were a series of cases, as I understood it, of which this case is one, and this particular cause of action was to be a test case for other causes of action in this particular case. I am not assuming any blame for any lack of diligence either for myself or my office. If that has appeared here during the development of this trial its one of those regrettable things. My further understanding is this case is quite far reaching. It has affected the financing of the apple crop. It affects certain methods used under the subordination agreement which the Government has not been overly satisfied with, and I believe in fairness to the apple grower and the Farm Commodity Corporation, and to this defendant, that a proper trial of this matter should be presented if the Court feels there has been a break down in some of the evidence, [167] and that I rest with the discretion of the Court.

I do not think at this stage of the proceedings that terms should be imposed on this motion if an order for dismissal without prejudice is granted.

The Court: We have had no case in this Court involving the question of non-suit. Under the rule just what discretion is left to the Court? We do have available all the rules and decisions. I would like to take a look at them. I am not worried about the possibility of making terms, because I would

just make an order of voluntary non-suit contingent upon the payment of terms with the provision in it, if they were not paid then there would be an involuntary non-suit of dismissal. I don't see any difficulties there, but I will take the matter under advisement for about 15 minutes. If you gentlemen want to come in and look thru the same source I am looking thru you are welcome to do so. We will now take a recess until 2 P.M.

Whereupon Court adjourned to 2 P.M., at which time, all parties present, the following proceedings were had.

The Court: I have examined all of the cases which have been decided with the adoption of these new rules, and it is apparent that the definite purpose of the rule is to prevent a plaintiff in a law suit who, thru no fault of the defendant finds himself at some point or other during the trial in a position where he wants to take a voluntary law suit or dismissal without prejudice and without compensating the defendant for the expense he has been put to. [168]

In the case of *Welter vs. Du Pont Company*, 1 Federal Rules Decision—551—the District Court of Minnesota said this: “* * * Rule 41 A (2) was undoubtedly framed so as to prevent the voluntary dismissal of an action upon the mere whim of the plaintiff after Answer was served where defendants have gone to considerable trouble and expense appearing for trial and the matter has been pending for over a year and no equities are shown or

made to appear on behalf of plaintiff's motion for dismissal. It seems evident that the Court would abuse its discretion in permitting such dismissal and relegate the defendants to a few dollars by way of statutory costs. But unless it appears that reasonable terms and conditions can not make the defendant reasonably whole I question that the Court should deny the motion. The right to dismiss before verdict has been long recognized by our Courts''.

Another case, *McCann vs. Bentley Stores Corporation*, 34 Federal Supplement, 234 at page 235, Judge Otis, whom you know has had considerable experience, has this to say: "The question for decision is whether plaintiff shall be permitted to dismiss this action without prejudice and if so upon what terms and conditions. Rule 41 (a) Rules of Civil Procedure for District Courts—28 U.S.C.A. following Section 723—provides in paragraph (1) for a dismissal without prejudice after answer upon stipulation. Paragraph (2) provides "except as provided in paragraph (1) of this subdivision of this rule an action shall not be dismissed at the plaintiff's instance save [169] upon order of the Court and upon terms and conditions as the Court deems proper. Unless otherwise specified in the order a dismissal under this paragraph is without prejudice. I consider that paragraph (2) of rule 41 (a) is one of the most valuable improvements over the old law accomplished by the new rules. The evil aimed at by the rule most largely is mani-

fested in the extreme situation described. To a lesser extent it is present in any instance in which a defendant is damaged by being dragged into court and put to the expense with no chance whatever, if there is a dismissal without prejudice, of having the suit determined in his favor. The dismissal without prejudice means the defendant has been put to the expense literally for nothing. When the Supreme Court promulgated this rule and provided that the Court might permit a dismissal without prejudice "upon such terms and conditions as the Court deems proper"—what sort of "terms and conditions" was contemplated? I have found nothing in the books upon which to base an answer, but no "terms and conditions are conceivable except such as are calculated to compensate the defendant for the expense to which he has been put. In the only public opinion dealing with paragraph (2) of Rule 41 (a) that is the view taken by the Court. *Paul E. Hankinson Co. vs. Goodman D. C.* 32 F. Supp. 732. The Motion to dismiss without prejudice in this case will be sustained only if the defendant is reimbursed its expenses." [170]

In this case I am frank to say if it were merely a suit brought upon this one cause of action and didn't involve nineteen other causes of action I would not hesitate in denying the Motion for dismissal without prejudice, and would pass upon the case upon its merits. Just hastily glancing at the figures—assuming plaintiff is right in this case they are entitled to recover the difference between 60c

and whatever was received by this Company. In the few sales that were made plaintiff could not recover more than forty or fifty dollars. I haven't yet made up my mind whether or not this subordination agreement is to be construed the way the plaintiff wants it to be construed, or the way the defendant wants it to be construed. However, there is in this case a matter of general policy which I think I should take into consideration in passing on this motion. Here we have a case involving the assistance the Government rendered to the Wenatchee Valley in allowing the initial financing during the year 1937. I may be overly sensitive to the obligations of those who do business in the Wenatchee Valley, fruit men, including this defendant, should recognize toward the Government for the assistance that has been rendered to them during the last [171] ten years. Nobody would be in business in the Wenatchee Valley and the Pacific Fruit and Produce Company would not be in business in the Wenatchee Valley were it not for the fact the initial financing has been furnished by the Government. There wouldn't be enough orchards left in the valley to justify the operation of the apple business there. Every year I have been in Washington when February came around back would come a delegation wanting to get some initial financing for the spray and to get started. There is a very definite difference between financing an apple crop after the fruit has been grown and just going out into an orchard that isn't sprayed—isn't

cleaned. Those who are dependent for their very existence on the orchards in the valley, warehouse men, commission men, and all of the various people, simply wouldn't touch it until it has gotten beyond the initial stage, and year after year I, personally, would travel from department to department in Washington, to get some of this assistance, and I know something about the original financing in this case, and some of the difficulties of getting the original financing. This case has been pending a long time. It should have been prepared. The defendant has been put to the expense, and should not have been put to the expense. Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word. These young men went out to examine the books, and did not examine the books. One of the witnesses testified—what to me would be the first book I would look [172] at and inquire for—and in out of twenty instances did they look at that book—and that is the ledger.

Now, if the plaintiff's contention is correct the defendant in this case did take those apples on which they had a mortgage, on which they had only subordinated themselves to the extent of 60c per box, and mixed them in with their own apples and made it extremely difficult for the Government to ascertain just what the situation was, but not sufficiently difficult to excuse the failure of the Government to get this information. It was my idea

last night that on the apples the Pacific Fruit Company had delivered to other warehouses and by their own act had made it impossible to prove the selling price of those apples, therefore the Government was entitled to prove damage by showing what was the reasonable market price of the apples during that same year. Then this morning the Government's witness admitted he wasn't qualified to answer the question. With all the facilities the Government has at its disposal and all the people in the Wenatchee Valley competent to testify as to market values, it certainly isn't justifiable for the Government to come in with one witness and say "I'm sorry but we can't prove it and therefore give us a voluntary dismissal and we'll start all over again" and put the defendant to the expense of preparing it again. I will say, frankly, if this case is started again, and the trial starts out the same way this has, without any preparation it just isn't going to trial.

Its impossible to determine how much the defendant [173] has been compelled to spend as the result of preparation of this case. If it is brought on again the two should merge to a certain extent. I find a case in the Second Circuit, DeFillipis vs. Chrysler, 116 Federal (2) 375, in which the Court entered an order. In that case the case was ready for trial upon the plaintiff's insistance, and it didn't go to trial. On the day of trial after the defendant was there with a lawyer and witnesses the plaintiff moved for voluntary non-suit. On April 4, 1938,

this motion was granted upon condition that the plaintiff pay to the defendant \$250 within thirty days with the stipulation if no such payment was made the case would be dismissed with prejudice. The thirty days went by and nothing was done. No final judgment was entered, and then plaintiff's lawyer—plaintiff got a new lawyer, and he attempted to appeal from that order and judgment after one and a half year's time. The Court said this:

“Purely as a matter of form the procedure below left something to be desired. When the time for the payment of the terms imposed expired without compliance with the order the entry of an order which took cognizance of that fact and dismissed the suit would have done away with any possible doubt as to whether and when a final order had been made. But here we do not think it necessary to decide whether the dismissal became final on June 18th, 1938, when the last extension ran out. If it did there was no appeal, and the District Court had no power to grant the motion as about a year and a half had gone by and the term [174] in which the order of dismissal was made had long since expired. Assuming, without deciding that it was not a final order, the Court did have jurisdiction with power to entertain the motion to modify the order appealed from denying the motion was clearly right. It was addressed to the discretion of the Court, and no reasonable excuse for the failure to make the required payment was presented.

Though still not in form a final order, it was one in effect for it finally determined that the dismissal was with prejudice and fixed the right of the parties thereto."

I will enter an order here of dismissal in response to plaintiff's motion, and provided that unless within forty five days from this date plaintiff shall pay to the defendant the sum of \$250 that the order of dismissal will be with prejudice and on that date I will sign an order of dismissal without further notice to the parties.

Mr. Sanders: May I say I think \$250 is a very low figure to put in that connection. I think it should be a substantially larger sum. I can't believe that is just compensation.

The Court: As I said there isn't a possibility of arriving at the proper figure of just compensation. If the case had been tried and defendant had won it there would be no such compensation. If the case should go on to another trial part of the time Counsel has spent will not be wasted. I admit it's more or less an arbitrary figure, picking the figures out of the air to arrive at it, but that's the figure I have arrived at and the order will read as I have indicated. It will be an order of dismissal [175] without prejudice with the condition precedent that the sum of \$250 shall be paid within forty five days, otherwise a judgment of dismissal with prejudice will be entered. The record will show defendant's motion is held in abeyance pending the payment by plaintiff to defendant the sum

of \$250 and defendant's motion will be granted unless the amount is paid.

Upon request of Counsel both sides were permitted by the Court to withdraw the exhibits introduced. [176]

State of Washington,
County of Spokane—ss.

I, J. J. Cole, Do Hereby Certify that I am the Court Reporter who reported the matters and proceedings occurring in the above entitled cause upon the trial thereof on April 28 and 29, 1942; that the above is an accurate transcription of such proceedings.

J. J. COLE

Court Reporter

[Endorsed]: Filed Dec. 21, 1942. [177]

PLAINTIFF'S EXHIBIT No. "A"
PACIFIC FRUIT AND PRODUCE CO.

| | | Cont. No..... | | Branch..... | | Principal Credits | Balance |
|---------|---------------|---------------|---|-----------------------------|--------|-------------------|----------|
| Date | Ticket Number | Geo. Brisky | Items | Packed Bxs. Credited | Debits | | |
| | | | | | | | |
| | | | | Balance from last statement | | | |
| Aug. 2 | 9534 | | Check | | 50.00 | | 50.00 |
| 10 | 12233 | | 6 gal Red drum 5 g Fish Oil 7 C's 8/6 Gras. | | 41.67 | | |
| 10 | 12253 | | Recording Crop Mtg..... | | 50 | | 95.99 |
| 10 | 12359 | | 2 gal Fish Oil 4 g Red drum..... | | 3.82 | | 145.99 |
| 12 | 9585 | | Check | | 50.00 | | 151.31 |
| 17 | 12348 | | 4 g Fish Oil 4 g Red Drum..... | | 5.32 | | 178.26 |
| 24 | 9642 | | Check—Floyd Williams | | 26.95 | | |
| 24 | 7422 | | 300 Bx shook—Less Tops—1 Keg 5½ Nail.... | | 40.81 | | 255.07 |
| 24 | 7430 | | 300 Bx shook—Less Tops..... | | 36.00 | | 270.07 |
| 31 | 9743 | | Check | | 15.00 | | 243.12 |
| 31 | Jr | | Trfd to John Brisky—ek #9642 to F Williams | | | 26.95 | |
| Sept 11 | 11469 | | 3373 # Barts John Brisky..... | | | 29.50 | |
| 11 | 11457 | | 3376 # Barts John Brisky..... | | | 35.46 | |
| 11 | 11488 | | 1436 # Barts John Brisky..... | | | 18.93 | 159.23St |
| 11 | 9900 | | Check Geo | | 20.00 | | 179.23 |
| Oct 9 | 10607 | | Check Geo | | 35.00 | | 214.23 |

| Geo. Brisky—(Continued) | | Branch..... | | | |
|-------------------------|------------------|--|-----------------------------|--------|----------------------|
| Date | Ticket Number | Items | Packed Bxs. Credited | Debits | Principal Credits |
| | | | | | Balance |
| 1937 | | | | | |
| Oct. | 9 | 18711 500 box shook Less T @ 12¼ Schimitten..... | | 61.25 | |
| | 9 | 18707 400 Box shook Less T @ 12¼ Schimitten..... | | 49.00 | 324.48 |
| | 9 | 10826 Check | | 5.00 | |
| | 16 | 10858 Check | | 10.00 | 339.48 |
| | 16 | 18838 Pkg 479 Jons (1008 L Jons) 479 Tops..... | | 140.89 | 480.37 |
| | 16 | 37559 163 Jon culls 5542 # | | | 469.29 |
| | 26 | 11245 Check Part Ck Bal B&W a/c 75.00..... | | 25.00 | 494.29 |
| | 30 | 18944 Packing 189 Debe (L.280) Tops. 12 boxes..... | | 51.60 | |
| | 30 | 24007 2 X F Jons..... | | 1.50 | |
| | 30 | 11398 Check | | 30.00 | 577.39 |
| | 30 | 37629 10 Face & Fill Jons..... | | | 2.90 |
| | 30 | 37624 1088# Delic Culls..... | | | 1.09 |
| | | | | | Fwd. |
| | | | | | 573.40 |
| | | | | | [178] |
| | | | | | Interest |
| | | | | | Da |
| | | | | | Amount |
| Oct | 30 | | Balance from last statement | | 573.40 |
| Oct | 30 | 37630 102 # Jon culls..... | | | .15 |
| Nov | 10 | 16154 126 L. Spitz Washed..... | | 10.08 | 573.25 |
| | 10 | 16151 Packing 241 Romes, Tops, 32 Washed Loose.. | | 65.23 | 648.56 |

Geo. Brisky—(Continued) Branch.....

| Date | Ticket Number | Items | Packed Bxs. Credited | Debits | Principal Credits | Balance Da | Interest Amount |
|------|---------------|--|----------------------|--------|-------------------|--------------|-----------------|
| 1937 | | | | | | | |
| Nov. | 10 | 37653 1088 # Spitz Culls..... | | | 2.72 | | |
| | 10 | 37659 2720 # Rome Culls..... | | | 6.80 | | |
| | 10 | 37654 2856 # Orch. Run Spitz..... | | | 21.42 | 617.62 | |
| Dec | 11 | 35818 2414 # Sap Culls..... | | | 2.41 | 615.21 | |
| | 11 | Jr Trfd to Brisky & W a/c 1/2 Spray Material..... | | | 25.40 | 589.81 | |
| | 18 | 16263 Packing 146 Saps (L. 361) Tops..... | | 45.79 | | 635.60 | |
| | 18 | 24292 415 Ex "C" Fey Jons..... | | | 207.23 | 428.37St. | |
| | 24 | 37660 216 # Large Romes loose (6 Bx)..... | | | 1.58 | 426.79 | |
| | 24 | 35860 14 Ex Romes 180-175..... | | | 8.26 | 418.53 | |
| 1938 | | | | | | | |
| Jan | 8 | 12442 189 Delic (92xF; 83 Fey, 14-c) less adv. stg.. | | | 135.64 | | |
| | 8 | 4661 40xJons 234's (from Tkt 24 292)..... | | | 15.60 | | |
| | 8 | 12588 146 Ex F&C Saps..... | | | 78.90 | 188.39 | |
| | 8 | Dk Trfd to Suspense..... | | | 20.58 | 167.81St. | |
| | 15 | CM 500 New Boxes..... | | | 65.00 | 102.81 | |
| Feb | 21 | 10321 227 Ex & F Romes..... | | | 80.07 | | |
| | 21 | 10323 32 small a Romes..... | | | 55 | 22.19St42.77 | |
| | 28 | 10497 24 x Jons..... | | | 6.96 | St37.10 | |
| | 28 | 10496 Refund storage Teht # 12442..... | | | 5.67 | 9.56St30.14 | |
| | 28 | JR Trfd to Suspense..... | | | 9.56 | ..... |  |

[179]

PLAINTIFF'S EXHIBIT "B"
PACIFIC FRUIT AND PRODUCE CO.

Cont. No.

Branch.....

Geo. Brisky
Cashmere

| Date | Ticket Number | Items | Packed Bxs. Credited | Debits | Principal Credits | Interest Balance Da Amount |
|----------|------------------|---|-----------------------------|--------|----------------------|----------------------------------|
| 1937 | | | Balance from last statement | | | |
| Aug. | 2 | Check | | 50.00 | | |
| 10 | 12233 | 6g Red Drum 5g Fish Oil 7 C's 8/6 Gras..... | | 41.67 | | |
| 10 | 12253 | Recording Crop Mtg..... | | .50 | | |
| 10 | 12359 | 2 gal. Fish Oil 4g Red Drum..... | | 3.82 | | |
| 12 | 9585 | Check | | 50.00 | | |
| 17 | 12348 | 4g Fish Oil 4g Red Drum..... | | 5.32 | | |
| 24 | 9642 | Check—Floyd Williams | | 26.95 | | |
| 24 | 7422 | 300 Bx Shook—Less Tops 1 Keg 5 1/2..... | | 40.81 | | |
| 24 | 7430 | 300 Bx Shook—Less Tops..... | | 36.00 | | |
| 31 | 9743 | Check | | 15.00 | | |
| 31 | J. R. | Tofd to John Brisky—ck #9642 to F. Williams | | | | 26.95 |
| Sept. 11 | 11469 | 3373 # Bants | | | | 29.50 |
| 11 | 11457 | 3376 # Bants | | | | 35.46 |
| 11 | 11488 | 1436 # Bants | | | | 18.93 |

Geo. Brisky—Cashmere—(Continued)

| Date | Ticket Number | Items | Packed Bxs. Credited | Debits | Principal Credits | Interest Balance Da Amount |
|----------|------------------|---|-------------------------|--------|----------------------|----------------------------------|
| 1937 | | | | | | |
| Sept. 11 | 9900 | Check—Geo. | | 20.00 | | |
| Oct. 9 | 10607 | Check—Geo. | | 35.00 | | |
| 9 | 18711 | 500 Bx Shook Less T @ 12¼ Schm..... | | 61.25 | | |
| 9 | 18707 | 400 Bx Shook Less T @ 12¼ Schm..... | | 49.00 | | |
| 9 | 10826 | Check | | 5.00 | | |
| 16 | 10858 | Check | | 10.00 | | |
| 16 | 18838 | Pkg. 479 Jons (1008 L. Jons) 479 T..... | | 140.89 | | |
| 16 | 37559 | 163 Jon Culls 5542#..... | | | 11.08 | |
| 26 | 11245 | Check | | 25.00 | | |
| 30 | 18944 | Packing 189 Delic (L. 280) Tops 12 Bxs..... | | 51.60 | | |
| 30 | 24007 | 2 Ex Jons | | 1.50 | | |
| 30 | 11398 | Check | | 30.00 | | |
| 30 | 37629 | 10 F & F Jons..... | | | 2.90 | |
| 30 | 37624 | 1088# Delic Culls..... | | | 1.09 | |

[180]

Geo. Brisky—Cashmere—(Continued)

| Date | Ticket Number | Items | Packed Exs. Credited | Debits | Principal Credits | Balance Da | Interest Amount |
|---------|------------------|--|-------------------------|--------|----------------------|------------|--------------------|
| 1937 | | | | | | 428.37 | |
| Dec. 18 | | Balance from last statement..... | | | 1.58 | | |
| 11/1 | 37660 | 216# lg. Romes loose (6 Bx)..... | | | 8.26 | | |
| 24 | 35860 | 14 X Romes—180s..... | | | | | |
| 1938 | | | | | | | |
| Jan. 8 | 12842 | 189 Delic (92XF, 83 Fcy, 14C) Less Adv. Stg. | | | 135.64 | | |
| 8 | 4661 | 40 X Jons—234s (from Tekt #24292)..... | | | 15.60 | | |
| 8 | 12588 | 146 X, Fcy, & C Saps..... | | | 78.90 | 188.39 | |
| | | | | | | | [182] |
| 1938 | | | | | | | |
| Jan. 8 | | Balance from last statement..... | | 188.39 | 65.00 | | |
| 15 | | 500 boxes | | | 80.07 | | |
| Feb. 21 | | 227 Ex & F Romes..... | | | .55 | 42.77 | |
| 21 | | Small C Romes..... | | | 5.67 | 37.10 | |
| 28 | | Additional on Delic..... | | | 6.96 | 30.14 | |
| 28 | | 24 X Jons 234s..... | | | | | [183] |

PLAINTIFF'S EXHIBIT No. "C"

No. 37629

247

PACIFIC FRUIT & PRODUCE CO.

Produce Ticket

From Geo. Briskey

Date 10-27-37

Address.....

Buyer.....

10/30

| Lot No. | Quantity | Articles | Weight | Price | Amount |
|---------|----------|------------------|--------|-------|--------|
| | 10 | Face & Fill Jons | | 30 | 3.00 |
| | | Advertising | | | .10 |

 2.90

Received by C

In the absence of a written contract of purchase the produce covered by this receipt is to be handled for Grower's account, and Grower hereby gives Company the right to re-consign, to sell to Company's branches, or to the general trade.

Grower warrants his title to produce covered herein and guarantees it is free from Crop Mortgage or other lien.

[184]

PLAINTIFF'S EXHIBIT "D"

In Account With

PACIFIC FRUIT & PRODUCE CO.

Packers and Car Lot Shippers
Distributors

164

1

Geo. Briskey
Cashmere

May 28, 1938

Branch—Cashmere

| Date | No. Boxes | Grade | Variety | Size | Price per box |
|---------|--------------|------------------------------|-----------|------|------------------|
| 10/27 | 10 | Face & Fill | Jons | | 30 |
| 11/4 | | Bulk Spitz (Est 68 Boxes) | | | 31¢ |
| | | | (Storage) | | |
| Dec. 18 | 47 | Ex Jons 163 & Lgr. | + 8¢ | | 29.14) |
| " 18 | 252 | Ex Jons 175-216 | + 8¢ | | 131.04) |
| " 18 | 23 | Fey Jons 163 & lgr | + 8¢ | | 11.98) |
| " 18 | 93 | Fancy Jons 175-216 | + 8¢ | | 39.20) |
| " 24 | 4 | O. R. Romes (216#) | | | 40 + |
| Nov. 26 | 14 | Ex Romes 180-175 | | | 60 |
| Jan. 8 | 47 | Ex Jons 163 & lgr (8B Delic) | | | 97 |
| Jan. 8 | 45 | Ex Jons 175-216 | " | | 77 |
| Jan. 8 | 34 | Fey Jons 163 & lgr. | " | | 67 |
| | | | | | 22.78) |
| | | | | | 1.58 |
| | | | | | 8.26 |
| | | | | | 207. 3 |
| | | | | | 3.00 |
| | | | | | 21.42 |
| | | | | | 21.42 |

Geo. Briskey—(Continued)

| Date | No. Boxes | Grade | Variety | Size | Price per box |
|---------|--------------|----------------------|------------|-------|------------------|
| Jan. 8 | 49 | Fey Jons 175-216 | (8B Delic) | ..... | 27.93) |
| Jan. 8 | 14 | "C" Jons 163 & lgr | " | ..... | 6.58) |
| Jan. 8 | 40 | Ex Jons 234s | ..... | ..... | 16.00 |
| Jan. 8 | (6 | Ex Saps 163 & lgr | ..... | ..... | 4.80 |
| Jan. 8 | (42 | Ex Saps 175-216 | ..... | ..... | 27.30) |
| Jan. 8 | (22 | Ex Saps 234-252 | ..... | ..... | 11.00) |
| Jan. 8 | N(10 | Fancy Saps 163 & lgr | ..... | ..... | 6.50) |
| Jan. 8 | (28 | Fancy Saps 175-216 | ..... | ..... | 14.00) |
| Jan. 8 | (37 | Fancy Saps 234-252 | ..... | ..... | 14.80) |
| Jan. 8 | (1 | "C" Saps 163 | ..... | ..... | .50) |
| Feb. 15 | 82 | Ex Romes 96-150 | ) | ..... | 34.44) |
| Feb. 15 | 13 | Ex Romes 163s |) N | ..... | 4.16) |
| Feb. 15 | 98 | Fey Romes 150 & lgr | ) | ..... | 36.26) |
| Feb. 15 | 34 | Facy Romes 163-216 | ) | ..... | 7.48) |
| Feb. 28 | 24 | Ex Jons 234s | ..... | ..... | 7.20 |

6.96

[185]

PLAINTIFF'S EXHIBIT No. "E"

United States Department of Agriculture
Farm Security Administration

SUMMARY TRANSCRIPT OF ACCOUNT OF
GEORGE M. BRISKEY, 56-4-202-874

| | | |
|-------------|---|----------|
| 1936 | Loan | |
| | Total Advances | \$630.00 |
| | Amount of Repayments Applied to Principal up to October 31, 1939.... | \$409.89 |
| | Amount of Repayments Applied to Interest up to October 31, 1939..... | 29.18 |
| | Total Amount of Repayments to Oc- tober 31, 1939..... | 439.07 |
| 1937 | Loan | |
| | Total Advances | 550.00 |
| | Amount of Repayments up to Octo- ber 31, 1939..... | None. |

On October 31, 1939, the balances due on the 1936 and 1937 loans were consolidated into a single renewal note. The status of the account since that date is as follows:

| | |
|---|----------|
| Amount of Repayments Applied to Principal since October 31, 1939.... | \$ 44.00 |
| Amount of Repayments Applied to Interest since October 31, 1939..... | 70.00 |
| Present Principal Balance on Com- bined 1936 and 1937 Loans..... | \$726.11 |
| Interest on Combined 1936 and 1937 Loans accrued to April 25, 1942..... | 107.46 |
| Interest accrues on the combined 1936 and 1937 loans at the daily rate of \$.0995. | |

#164

[186]

State of Oregon,
County of Multnomah—ss.

I, D. D. Oberle, being first duly sworn, depose and say that I am the Regional Finance and Business Manager of Region XI, of the Farm Security Administration, United States Department of Agriculture, that I have custody of and control over the accounts of the United States with respect to loans and advances made by the Resettlement Administration and its successor, the Farm Security Administration, and that the foregoing is a true, correct and complete summary transcript of the account maintained by me for loans and advances made during the years 1936 and 1937 to, and the repayments on such loans made by George M. Briskey.

/s/ D. D. OBERLE

Subscribed and sworn to before me this 27 day of April, 1942.

/s/ EDW. J. JOHNSON

[Seal]

Notary Public for Oregon

My commission expires: 1-14-45. [187]

State of Oregon,
County of Multnomah—ss.

I, Walter A. Duffy, being first duly sworn, depose and say that I am the Regional Director of Region XI of the Farm Security Administration, United States Department of Agriculture, that D. D. Oberle is the Regional Finance and Business Manager of Region XI of the Farm Security Administration, United States Department of Agriculture, and that said D. D. Oberle has custody of and control over the accounts with respect to loans made by the Resettlement Administration and its successor, the Farm Security Administration.

/s/ WALTER A. DUFFY

Subscribed and sworn to before me this 27 day
of April, 1942.

/s/ EDW. J. JOHNSON

[Seal]

Notary Public for Oregon

My commission expires: 1-14-45. [188]

DEFENDANT'S EXHIBIT "1"

| Client: Geo. Brisky | | | Warehouse—Pacific | | | Cashmere | | | Date: 5/20 | | |
|---------------------|--------------|-------------|-------------------|---------|-------------------------|------------------------------|-------------------------|---------------|------------|--|--|
| Date | No. of Boxes | Variety | Grade | Size | Gross Price From Broker | Deductions Up to 60c per Box | Balance per Box Due FSA | Total Due FSA | Remarks | | |
| 10/27 | 10 | Jonathans | F & F | all | 60- | 6.00 | 30 | 30 | 3.00 | | |
| 11/ 4 | 68(Est) | Spitz(bulk) | All | " | 31 | 21.08 | 31 | — | — | | |
| 12/11 | 47 | Jonathans | Ex | 163/- | 62 | 29.14 | | | | | |
| " | 252 | " | " | 175-216 | 52 | 131.04 | | | | | |
| " | 23 | " | Fcy | 163/1 | 52 | 11.96 | 60 | — | — | | |
| " | 93 | " | " | 175-216 | 42 | 39.06 | | | | | |
| 12/24 | 4 | Romes | Orchard | Run | 40 | 1.60 | 60 | — | — | | |
| 11/26 | 14 | " | Ex | 180-175 | 60 | 8.40 | 60 | — | — | | |
| 1/ 8 | 47 | Jons | " | 163/- | 97 | 45.59 | | | | | |
| " | 45 | " | " | 175-216 | 77 | 34.65 | | | | | |
| " | 34 | " | Fcy | 163/- | 67 | 22.78 | 60 | — | 16.13 | | |
| " | 49 | " | " | 175-216 | 57 | 27.93 | | | | | |
| " | 14 | " | C | 163/- | 47 | 6.58 | | | | | |
| " | 40 | " | Ex | 234 | 40 | 16.00 | | | | | |

DEFENDANT'S EXHIBIT "2"

United States Department of Agriculture
FARM SECURITY ADMINISTRATION
Wenatchee, Washington

June 1, 1938

Pacific Fruit & Produce Co.

To: Cashmere, Washington

Dear Sir:

The statement of account dated May 28, 1938 which you have submitted and indicating that you sold 1069 packed boxes of apples for our client, Geo. Brisky has been received and examined by this office.

It is assumed that the prices quoted as the prices received are the gross proceeds, that is, the amount received before the deduction of any amounts for packing or storage charges, for inspection, insurance, advertising, or analysis costs, or for advances made by you to the grower for any other purpose.

It is further assumed that the charges against each box of apples which you have made represent actual charges, in no instance exceeding the total sum of \$.60 per box for services or supplies furnished or for funds advanced for packing, storage, inspection, insurance, advertising, analysis, or for any of the purposed specifically mentioned in the subordination agreement executed by the United States Department of Agriculture, (Form RA-11 LE-7). Providing these assumptions are correct,

the amount of the proceeds which should be paid over to the United States after the deduction by you of all the charges which you are authorized to deduct pursuant to that subordination agreement is \$19.13, of which \$0 has been paid, leaving a balance of \$19.13. You are, therefore respectfully requested to make payment to the United States of this balance. Upon the payment of this sum a release of mortgage covering the apples heretofore sold by you and covered in the statement of account referred to. will be executed and delivered to the client or to you as you and the client may determine.

The amount determined to be due has, as indicated above, been computed upon the basis that the aforementioned assumptions are correct. It should be understood that if the amount of the proceeds of the sale of apples as set forth in the statement submitted by you does not represent the gross proceeds in any particular case, or if the charges for which deductions have been claimed by you and allowed by this office are in excess of the actual charges against the apples sold, the United States reserves and will assert any and all rights which it may otherwise have. Your remittance of the sum herein requested is understood to be upon this basis.

Very truly yours,

B. R. PHIPPS

County Supervisor

April 1942 Term

Wednesday April 29, 1942

14th day

Court Convened Pursuant to Adjournment, at
9:00 A.M.

Present: Honorable Lewis B. Schwellenbach, District Judge, A. A. LaFramboise, Clerk, Harvey Erickson, Assistant U. S. Attorney, R. R. Isaacs, Deputy U. S. Marshal.

PROCEEDINGS

No. 164

RECORD SECOND DAY OF TRIAL

[Title of Cause.]

Now on this 29th day of April, 1942, all parties being present in court, trial of this cause resumed. The following witnesses were sworn and testified on behalf of the plaintiff:

1. O. R. Barrett
2. B. R. Phipps
3. C. D. Raines
4. M. F. Schons

Plaintiff's Identification F—Withdrawn.

Plaintiff rested at 11:50 A.M.

Plaintiff then moved for voluntary non-suit without prejudice.

Defendant moved for dismissal of plaintiff's case with prejudice,—held in abeyance.

Plaintiff's motion Granted provided that payment in the sum of \$250.00 be made to defendants within forty-five days and if such payment is not made then dismissal with prejudice will be entered.

All exhibits withdrawn by the respective parties.

* * * * *

Thereupon Court adjourned until tomorrow April 30th, 1942, at 9:30 A.M. [192]

[Title of Court and Cause.]

ORDER OF DISMISSAL

This matter having come regularly on for trial before the undersigned Judge of the above entitled court, on the 28th day of April, 1942, upon the complaint of the plaintiff and the Answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States District Attorney, and the defendant appearing in open court by Howard W. Sanders, of the law firm of Ryan, Askren & Mathewson, and both parties having announced themselves ready for trial, and the plaintiff having introduced evidence in support of its complaint and having rested,

And it further appearing to the court that the plaintiff introduced no sufficient evidence in support of its complaint entitling it to a recovery,

And the plaintiff having moved for a voluntary Order of Dismissal without prejudice, and the defendant having moved for a dismissal with preju-

dice, and the court having heard the arguments and being fully advised in the premises,

And it appearing to the court that the defendant has necessarily expended considerable money in the preparation of its defense in the above entitled action,

Now Therefore, it is hereby ordered that if the plaintiff shall pay to the defendant within 45 days from this date the sum of \$250.00 to reimburse it for funds expended in the preparation of its defense, that the above entitled action will be dismissed without prejudice. If the plaintiff shall fail within said period of time from said date to make payment of \$250.00 then the above entitled action shall be dismissed with prejudice.

It Is Further Ordered that the plaintiff may withdraw from the files of the above entitled court plaintiff's exhibits B, C, D and E, and the defendant may withdraw from the files of the above entitled court plaintiff's A and the defendant's Exhibit 1 and 2.

Done in Open Court this 29th day of April, 1942.

L. B. SCHWELLENBACH

United States District Judge

Presented by:

HARVEY ERICKSON

Approved by:

HOWARD W. SANDERS

[Endorsed]: Filed April 29, 1942. [193]

[Title of Court and Cause.]

MOTION FOR DISMISSAL

Comes now the defendant and moves the court for an order dismissing the above entitled action with prejudice. This motion is based upon all the files, records and proceedings herein and the affidavit hereunto attached.

RYAN, ASKREN &

MATHEWSON

HOWARD W. SANDERS

State of Washington

County of King—ss.

Howard W. Sanders, being first duly sworn, on oath deposes and says:

That he is an attorney at law associated with Ryan, Askren & Mathewson and one of the attorneys for the defendant of the above entitled action. The above entitled court did on the 29th day of April, 1942, enter its certain order by the terms of which it specified that if the plaintiff failed to make a payment of \$250.00 to the defendant within forty-five days from the date of said order then the above entitled action would be dismissed with prejudice. The plaintiff has wholly failed to pay said sum of \$250.00 to the defendant. Affiant makes this affidavit in support of the defendant's motion for dismissal of the above entitled action with prejudice.

HOWARD W. SANDERS

Subscribed and Sworn to Before Me This 15
Day of June, 1942.

[Seal] JOHN E. RYAN, JR.

Notary Public in and for the State of Washington,
Residing at Seattle.

Copy Rec'd June 17, 1942.

HARVEY ERICKSON

Ass't U. S. Atty.

[Endorsed]: Filed June 25, 1942. [194]

[Title of Court and Cause.]

MOTION FOR CONTINUANCE OR FOR DIS-
MISSAL WITHOUT PREJUDICE

Comes now the plaintiff United States of America
by Edward M. Connelly, United States Attorney,
and Harvey Erickson, Assistant United States At-
torney for the Eastern District of Washington, and
under the authority and direction of the Attorney
General of the United States moves the Court for
an order continuing the above case to allow for
further introduction of evidence as to the market
value of the mortgaged fruit at the time of con-
version or, in the alternative, moves the Court for
an order dismissing the above-entitled action with-
out prejudice.

EDWARD M. CONNELLY

United States Attorney

HARVEY ERICKSON

Assistant United States

Attorney

[Endorsed]: Filed July 2, 1942. [195]

[Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come regularly on to be heard before the undersigned Judge of the above-entitled Court upon the 28th and 29th days of April, 1942, upon the complaint of the plaintiff and answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States Attorney, and the defendant appearing by Ryan, Askren & Mathewson and Howard W. Sanders, its attorneys, and the Court having directed that the parties try the third cause of action contained in the plaintiff's complaint and that the judgment rendered in said cause of action should be applicable to the other causes of action contained in plaintiff's complaint, and evidence having been introduced in behalf of the plaintiff, and the plaintiff having rested, and the Court having heard the evidence, and the plaintiff having moved for voluntary dismissal without prejudice, and the defendant having moved for dismissal with prejudice, and the said motions having been submitted to the Court, the Court, having heard the arguments and the evidence introduced and being fully advised in the premises, does make the following

FINDINGS OF FACT

I.

That the Farm Security Administration, formerly the Resettlement Administration, was and now is a

division, branch, and official Federal agency of the United States of America, duly created and authorized and empowered to act as such by Executive Order No. 7027 and Executive Order No. 7530, and by reason of said facts the United States of America is the real party in interest herein as plaintiff and the above-entitled Court has jurisdiction of this case.

II.

That the defendant Pacific Fruit and Produce Company is a corporation duly licensed and qualified to do business in the state of Washington, its principal place of business being located in the City of Seattle, Washington. [196]

III.

That between the dates of April 6, 1937, and June 15, 1937, the plaintiff advanced to George M. Brisky and Evelyn Brisky, husband and wife, of Route 1, Cashmere, Chelan County, Washington, hereinafter referred to as the borrowers, the sum of \$550.00; that in addition thereto the said George M. Brisky and Evelyn Brisky are indebted to the plaintiff in the sum of \$220.11 on account of the balance due on a loan made to them during the year 1936.

IV.

That between the dates of April 6, 1937, and June 15, 1937, the plaintiff advanced the sum of \$550.00 to the said George M. Brisky and Evelyn Brisky, who made, executed, and delivered to the

United States certain promissory notes in writing in the amounts of \$165.00, \$155.00, and \$230.00, dated April 6, 1937, April 22, 1937, and June 15, 1937, respectively; that on March 28, 1938, in consideration of the balance then due on the 1936 loan and to evidence their indebtedness therefor, the said George M. Brisky and Evelyn Brisky made, executed, and delivered to the United States a certain renewal promissory note in writing in the sum of \$220.11, dated March 28, 1938.

V.

That on or about April 9, 1937, in order to secure the repayment of the sum of \$795.00, which included the balance then due on the 1936 loan in the sum of \$630.00 and the sum of \$165.00 which had then been advanced to them, and to secure future advances in the sum of \$385.00, which are evidenced by their promissory notes, the said George M. Brisky and Evelyn Brisky executed and delivered to the plaintiff a certain crop and chattel mortgage, which crop and chattel mortgage was verified and acknowledged on April 9, 1937, and was thereafter on the same day filed in the office of the County Auditor of Chelan County, Washington, as Instrument No. 40456.

VI.

By said crop and chattel mortgage the plaintiff acquired a first lien on all fruit crops produced or to be produced by the said George M. Brisky and Evelyn Brisky during the year 1937 upon the following described [197] real property, to-wit:

Beginning at a point on the Section line between Sections 11 and 12, Township 23 N., Range 18, E. W. M., 800 ft. S. of the Govt. $\frac{1}{4}$ corner between aforesaid Sec. 11 and 12, running thence (corrected course) N. 57 51' E. to N. line of the NW $\frac{1}{4}$ of SW $\frac{1}{4}$ of said Sec. 12; thence E. to the NE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$; thence S. to the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence W. to the SW corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running N. to the point of beginning. Excepting the following tract of land: beginning at the SE corner of the NW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Sec. 12, thence running E. along the S line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ a distance of 580 ft. to a stake; thence N. a distance of 196 ft. to a stake; thence E. 580 ft. to said E. line of said NW $\frac{1}{4}$; thence S. along the E line of said NW $\frac{1}{4}$ of SW $\frac{1}{4}$ to the place of beginning, containing $\frac{2}{6}$ acres, more or less.

Part of the SW $\frac{1}{4}$ of Sec. 12, Twp. 23 N., R. 18 E. W. M. described as follows, to-wit: Beginning at the NW corner of the SW $\frac{1}{4}$ of SW $\frac{1}{4}$, Sec. 12, Twp. 23 N., R. 18 E. W. M., and running S. 317 ft. to a stake; thence E. 740 ft. to a stake; thence N. 317 ft. to a stake; all of the above being in Chelan County, Washington

and the following described personal property:

2 white horses, 1-17 yrs., 1-12 yrs., 1600 lbs., each (approx.)

1 Jersey heifer, 1 yr., dark red, shading to black in color

1 Jersey cow, cream color, 7 yrs., horns "Boss" no ear tag

all chickens, approximately 40 Leghorns and Buff Orphingtons

23 hogs—5 sows white, 2 yrs., 1 black boar, 2 yrs., 17 shoats, white and black, 6 months

1 Sterling pump, #6842

1 3 Hp. U. S. Motor, #106740

1 1 Hp. Sears Roebuck Motor

1 1 $\frac{1}{4}$ " pump

1 200 gal. wood tank

1 12 gal. Haride pump

150 ft. (approx.) of 1 $\frac{1}{4}$ " black pipe

1500 Ft. (approx.) of $\frac{3}{4}$ " galv. spray pipe

Misc. orchard tools and equipment

1-20 tooth spike tooth harrow

1—2 shovel Oliver Ditcher, steel tongue, horse drawn

1—2 horse disc, 8 blade, steel hookings, no seat

1—4 wheel (steel) wagon, wood tongue

1 Spring tooth harrow

1 McCormick mower, wood tongue (spliced)

1 McCormick rake, 2x8 wood tongue

which first lien was an essential part of plaintiff's security for the repayment of the indebtedness of

the said George M. Brisky and Evelyn Brisky to the plaintiff.

VII.

That by virtue of the execution of said notes there now remains due and owing to the plaintiff on the principal of said notes the sum of \$770.11 with interest thereon at the rate of 5% per annum until paid. [198]

VIII.

That the funds advanced by the plaintiff to the said George M. Brisky and Evelyn Brisky were insufficient to finance the entire cost of producing and marketing the fruit crops to be produced on the above described real property during the year 1937 and additional funds were needed for such purposes; that arrangements were made between the borrowers and the defendant whereby the defendant proceeded to advance the additional funds required for the producing, handling, storage, and marketing of the said fruit crops and for the rendering of necessary services by the defendant in connection therewith.

IX.

That the terms and arrangements by which the defendant advanced money to the borrowers for the completion of services in connection with the 1937 fruit crops were that the defendant obtain a crop mortgage or other lien which would be a first and prior lien to all other liens upon the fruit crops to be produced by the said borrowers during the year 1937 upon the real property above described to

secure the repayment of the funds advanced by the defendant to finance the additional costs of producing, handling, storage, and marketing the said fruit crops.

X.

That the plaintiff executed a subordination agreement subordinating the lien of the crop and chattel mortgage in favor of the plaintiff upon the fruit crops to be produced by the said borrowers on the above described real property during the year 1937 to crop mortgages or other liens upon such fruit crops to be created in favor of the defendant to secure repayment to the defendant of sums advanced to said borrowers to finance the additional cost of producing, handling, and marketing the said fruit crops.

XI.

That the plaintiff then executed a limited subordination agreement, by the terms of which agreement the plaintiff subordinated, to the extent set forth in said agreement, the lien of the crop and chattel mortgage in favor of the plaintiff upon the fruit crops to be produced during 1937 by the borrowers upon the above described real property to any and all liens [199] thereafter created in favor of the defendant to secure the repayment of funds advanced to the borrowers or charges incurred for services in connection with the producing, handling, and marketing of the said 1937 fruit crops, the terms of which subordination agreement

provide that plaintiff's crop and chattel mortgage above described shall be subordinated to any and all liens upon the mortgagors' fruit crops for the year 1937 thereafter created by the said mortgagors in favor of the defendant to secure said loan; provided, however, that such subordination shall be limited to the extent of 60 cents per box on all fruit sold by the mortgagors and does specifically agree that the defendant shall have the right to deduct and receive from the sales made by the said mortgagors of their 1937 fruit crops the sum of 60 cents per box from each sale made by them until the loan made by the defendant shall have been paid in full and that the United States shall have a first lien upon all proceeds from each and every sale of any part of the mortgagors' 1937 fruit crops after the deduction of 60 cents per box from the proceeds of each sale has been made by the defendant.

XII.

That thereafter the defendant proceeded to advance funds and render services as were needed by the said borrowers George M. Brisky and Evelyn Brisky to aid them in financing such additional costs as were involved in producing, handling, and/or marketing the fruit crops produced during 1937 by the borrowers on the above described real property.

XIII

That thereafter the defendant received from the borrower 1,137 boxes of apples, of which apples

the defendant converted to its own use 298 boxes as follows:

| No. of Boxes | Size | Grade | Variety | Date |
|--------------|---------------|-------|--------------------|---------|
| 30 | 234 | F | Winesap | 1-22-38 |
| 48 | 56-150 | XF | Delicious | 2- 1-38 |
| 26 | 125-150 | | ½ Winesap ; ½ Del. | 2-10-38 |
| 6 | all | XF | Delicious | 3- 2-38 |
| 46 | 138-163 | | Romes | 2-10-38 |
| 3 | | C | Delicious | 3- 2-38 |
| 5 | 130-165 | F | Romes | 3- 2-38 |
| 7 | | C | Delicious | 3- 5-38 |
| 12 | 163 | XF | Delicious | 3- 5-38 |
| 8 | Medium | F | Delicious | 3-12-38 |
| 2 | 88-96 | F | Winesap | 3-10-38 |
| [200] | | | | |
| 4 | 163 | XF | Winesap | 3-24-38 |
| 11 | 163 & smaller | XF | Delicious | 4-13-38 |
| 25 | 216 | F | Delicious | 4-20-39 |
| 30 | | XF | Romes | 3- 3-38 |
| 14 | 143 & larger | XF | Delicious | 2-26-38 |
| 21 | | C | | 3-16-38 |

and that there was no proof submitted as to whether or not defendant converted any of the remaining boxes of apples.

XIV

No proof was submitted as to the value of the fruit converted by the defendant.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by

HOWARD W. SANDERS,
Attorney for Defendant.

From the foregoing Findings of Fact and evidence introduced, the Court makes the following

CONCLUSIONS OF LAW

That the above-entitled action should be dismissed with prejudice.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by

HOWARD W. SANDERS,
Attorney for Defendant.

Copy received this 6th day of July, 1942.

HARVEY ERICKSON,
Assistant United States At-
torney.

[Endorsed]: Filed July 6, 1942. [201]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

JUDGMENT OF DISMISSAL

This matter having come regularly on to be heard before the undersigned Judge of the above-entitled Court upon the 28th and 29th days of April, 1942, upon the complaint of the plaintiff and answer of the defendant, and the plaintiff appearing in open court by Harvey Erickson, Assistant United States Attorney, and the defendant appearing by Ryan, Askren & Mathewson and Howard M. Sanders, its attorneys, and the Court having directed that the parties try the third cause of action contained in the plaintiff's complaint and that the judgment rendered in said cause of action should be applicable to the other causes of action contained in the plaintiff's complaint, and evidence having been introduced in behalf of the plaintiff, and the plaintiff having rested, and the Court having heard the evidence, and the plaintiff having moved for voluntary dismissal without prejudice and the defendant having moved for dismissal with prejudice,

and the said motions having been submitted to the Court, the Court having heard the arguments and the evidence introduced and being fully advised in the premises. and having heretofore entered its Findings of Fact and Conclusion of Law, and it appearing to the Court that the Court did heretofore on the 29th day of April, 1942, enter its preliminary order, and plaintiff having failed to comply with such order by reimbursing defendant in the sum of \$250.00; Now, Therefore, it is hereby

Ordered that the above-entitled action be, and the same hereby is, dismissed with prejudice.

Approved. Clerk is directed to enter.

Dated this 6th day of July, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

Presented by:

HOWARD W. SANDERS,
Attorney for Defendant.

Copy received this 6th day of July, 1942.

HARVEY ERICKSON,
Assistant United States At-
torney.

[Endorsed]: Filed July 6, 1942. [202]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit

from the final judgment in this case dated July 6, 1942.

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
Assistant United States At-
torney.

Copy mailed to Ryan, Askren & Mathewson Sept.
30, 1942.

A. A. LaFRAMBOISE,
Clerk. [203]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET-
ING RECORD ON APPEAL

It appearing to the court that it will be impos-
sible for the plaintiff-appellant, United States of
America, to have its record on appeal docketed
within forty days from September 30, 1942, it
is therefore

Ordered that pursuant to Rule 73g of the Rules
of Civil Procedure, that the time for filing the rec-
ord on appeal and docketing the action with the
Clerk of the Circuit Court of Appeals is extended
to a time not more than ninety days from the date
of the filing of the first notice of appeal or until
December 29, 1942.

Dated this 30 day of October, 1942.

L. B. SCHWELLENBACH,
United States District Judge.

[Endorsed]: Filed Oct. 30, 1942. [204]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 164

UNITED STATES OF AMERICA,

Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Appellee.

ORDER EXTENDING TIME FOR FILING
TRANSCRIPT OF RECORD

This matter coming on before the undersigned, one of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the said Judge that it will be impossible for the Appellant, the United States of America, to file its transcript of record within the ninety day extension of time affixed by the trial Judge, which expires December 29, 1942, and that the delay was not due to the negligence of the Appellant; that said extension is necessary to protect the rights of the Appellant, it is therefore

Ordered that the Appellant have until January 10, 1943, in order to file its transcript of record in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 24 day of December, 1942.

CURTIS D. WILBUR,

United States Circuit Judge.

Filed in the U. S. District Court, Eastern Dist.
of Washington, Dec. 26, 1942.

A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed Dec. 24, 1942.

PAUL P. O'BRIEN,
Clerk.

A true copy.

Attest: Dec. 24, 1942.

[Seal] PAUL P. O'BRIEN,
Clerk. [205]

In the District Court of the United States for the
Eastern District of Washington, Northern Di-
vision.

No. 164

UNITED STATES OF AMERICA,
Plaintiff,
vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,
Defendant.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY UNDER
RULE 19 (CAA 9)

Comes now the plaintiff, United States of Amer-
ica, and hereby makes this concise statement of the
points upon which it intends to rely on appeal.

1. The District Court lacked authority to condition the right of the United States to dismiss its action without prejudice upon the payment of the sum of \$250.00 as reimbursement to the defendant for the costs incurred in the preparation of its defense.

2. The District Court erred in dismissing the complaint of the United States with prejudice because of its failure to pay the sum of \$250.00 to the defendant.

3. The District Court erred in failing to enter judgment for the United States after it had been established that the defendant had been guilty of conversion.

4. The District Court erred in finding that 298 boxes of apples only had been converted.

5. The District Court erred in excluding the evidence which the United States submitted and offered for the purpose of establishing a market value of the apples so converted.

6. The District Court erred in dismissing all causes of action of the complaint though a hearing had been conducted only in respect to the third cause of action thereof.

7. The District Court erred in entering judgment for the defendant.

8. The District Court erred in failing to cause the defendant to produce the complete records as to the sale and disposition of the fruit as called for in the subpoena issued by the plaintiff.

The entire record has been designated by the appellant to be printed.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney. [206]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
TO CONSTITUTE RECORD ON APPEAL

Comes now the plaintiff, United States of America and hereby designates the portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled cause, to-wit:

Amended Complaint (Third Cause of Action and Prayer)

Motion to Dismiss Amended Complaint

Order Denying Motion to Dismiss Amended Complaint

All exhibits pertaining to the Third Cause of Action

Exhibits No. 11, 12, 13, 14, 15 and 16

Clerk's minutes at time of trial showing Third Cause of Action only to be tried.

Answer of Defendant.

Plaintiff's Motion for Dismissal without Prejudice

Defendant's Motion for Dismissal with Prejudice

Order of Dismissal, April 29, 1942

Motion for Final Dismissal

Plaintiff's Motion for Continuance or for Dismissal without Prejudice

Findings of Fact and Conclusions of Law

Final Order of Dismissal

Notice of Appeal

Order extending time for Filing Transcript of Record

Designation of Portions of Record to Constitute Record on Appeal

Statement of Points to be Relied upon

Transcript of testimony

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States Attorney.

[Endorsed]: Filed Dec. 22, 1942. [207]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,

Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing type-written pages numbered from 1 to 207 inclusive, to be a full, true, correct and complete copy of

so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals, as called for by the appellant in his Designation of Record on Appeal, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the Judgment of Dismissal of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 6th day of January, 1943.

[Seal]

A. A. LaFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: No. 10340. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pacific Fruit & Produce Company, a Corporation, Appellee, Transcript of Record Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed January 9, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10340

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
Corporation,
Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Northern Division

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 164

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PACIFIC FRUIT & PRODUCE COMPANY, a
corporation,

Defendant.

SUPPLEMENTAL STATEMENT OF POINTS
UPON WHICH APPELLANT INTENDS
TO RELY UNDER RULE 19 (CAA 9).

Comes now the plaintiff, United States of America, and hereby makes this supplemental statement of the points upon which it intends to rely on appeal.

9. The District Court, after entering findings of fact which disclosed that the United States was entitled to have entered a judgment at least for nominal damages, erred in sustaining the defendant's motion to dismiss the complaint with prejudice.

10. The District Court erred in holding, in an action which was basically one for an accounting, that the burden was on the United States rather

than upon the defendant, to establish the prices for which the apples had been sold.

EDWARD M. CONNELLY,

United States Attorney.

HARVEY ERICKSON,

Assistant United States At-
torney.

[Endorsed]: Filed Jan. 12, 1943.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE BY MAIL

United States of America,

Eastern District of Washington—ss.

Evelyn Gerhauser, being first duly sworn, upon oath, deposes and says:

That she is now and was at all times hereinafter mentioned a citizen of the United States and of the State of Washington, over the age of 21 years; that on January 12th, 1943, by regular mail she sent full, true and correct copies of the attached Supplemental Statement of Points Upon Which Appellant Intends to Rely under Rule 19 (CAA 9) and Supplemental Designation of Record on Appeal in the above entitled cause to Howard Sanders, one of the attorneys for the Appellee, Pacific Fruit & Produce Company, a corporation, by depositing such copies in the United States Mail in the Postoffice at Spokane, Washington, on said date in a franked envelope not requiring postage, di-

rected to said Howard Sanders, White-Henry-Stuart Building, Seattle, Washington, there being regular communication by mail at said time between Spokane and Seattle, Washington.

[Seal] EVELYN GERHAUSER

Subscribed and sworn to before me this 12th day of January, 1943.

EVA M. HARDIN,

Deputy Clerk, United States District Court, Eastern District of Washington.

[Endorsed]: Filed Jan. 12, 1943.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
RECORD ON APPEAL

To the Clerk of the above entitled Court:

You are hereby requested to forward to the Circuit Court of Appeals as a Supplemental Record on Appeal, the following:

1. Supplemental Statement of Points upon which Appellant Intends to Rely under Rule 19 (CAA 9) with Affidavit of Mailing.

2. This additional Supplemental Designation of Record on Appeal.

EDWARD M. CONNELLY,
United States Attorney.

HARVEY ERICKSON,
Assistant United States At-
torney.

United States of America

Eastern District of Washington—ss:

I, A. A. LaFramboise, Clerk of the United States District Court in and for the Eastern District of Washington, do hereby certify that the annexed and foregoing is a true and full copy of the original Supplemental Statement of Points upon which Appellant intends to rely under Rule 19 (CAA 9), Affidavit of Service by mail, and Supplemental Designation of Record on Appeal, in Cause No. 164, United States of America, Plaintiff, vs. Pacific Fruit & Produce Company, a corporation, and that the same constitutes the Supplemental Record on Appeal as called for by the Plaintiff in its Supplemental Designation of Record on Appeal in said cause, now remaining among the records of the said Court in my office, at Spokane, Washington.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Spokane this 12th day of January, A. D. 1942.

[Seal]

A. A. LaFRAMBOISE

Clerk.

[Endorsed]: Filed Jan. 12, 1943.

No. 10340 2

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION,
APPELLEE**

**UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION**

BRIEF FOR THE UNITED STATES OF AMERICA

FILED

MAY 7 - 1943

**PAUL P. O'BRIEN,
CLERK**

INDEX

| | Page |
|---|------|
| Jurisdictional statement----- | 1 |
| Statement of the case----- | 1 |
| Questions involved----- | 9 |
| Specification of errors----- | 10 |
| Summary of argument----- | 11 |
| Argument: | |
| I. The court below erred in conditioning the dismissal of the complaint without prejudice upon plaintiff's reimbursing defendant in the sum of \$250----- | 14 |
| 1. The Government could not have been ordered to pay this sum to defendant----- | 14 |
| 2. The condition attached to the granting of plaintiff's motion for dismissal without prejudice was an abuse of discretion----- | 16 |
| 3. Plaintiff's motion for a dismissal without prejudice or for a continuance should have been granted unconditionally----- | 18 |
| II. The court erred in dismissing all twenty causes of action with prejudice----- | 21 |
| 1. Upon plaintiff's failure to pay defendant \$250, the court should have decided the case as though plaintiff's motion for dismissal without prejudice had not been made----- | 21 |
| 2. The court below erred in not requiring a full account- ing by defendant----- | 23 |
| 3. The court below erred in not finding conversion of all the fruit delivered to defendant----- | 25 |
| 4. The court erred in not awarding plaintiff nominal damages for defendant's conversion of 298 boxes of fruit----- | 26 |
| 5. Failure to ward nominal damages to plaintiff is re- versible error because substantial rights of plaintiff were impaired thereby----- | 27 |
| (a) Prejudice to nineteen other causes of action-- | 28 |
| (b) The United States as the prevailing party was entitled to costs----- | 29 |
| Conclusion----- | 30 |
| Appendix----- | 31 |

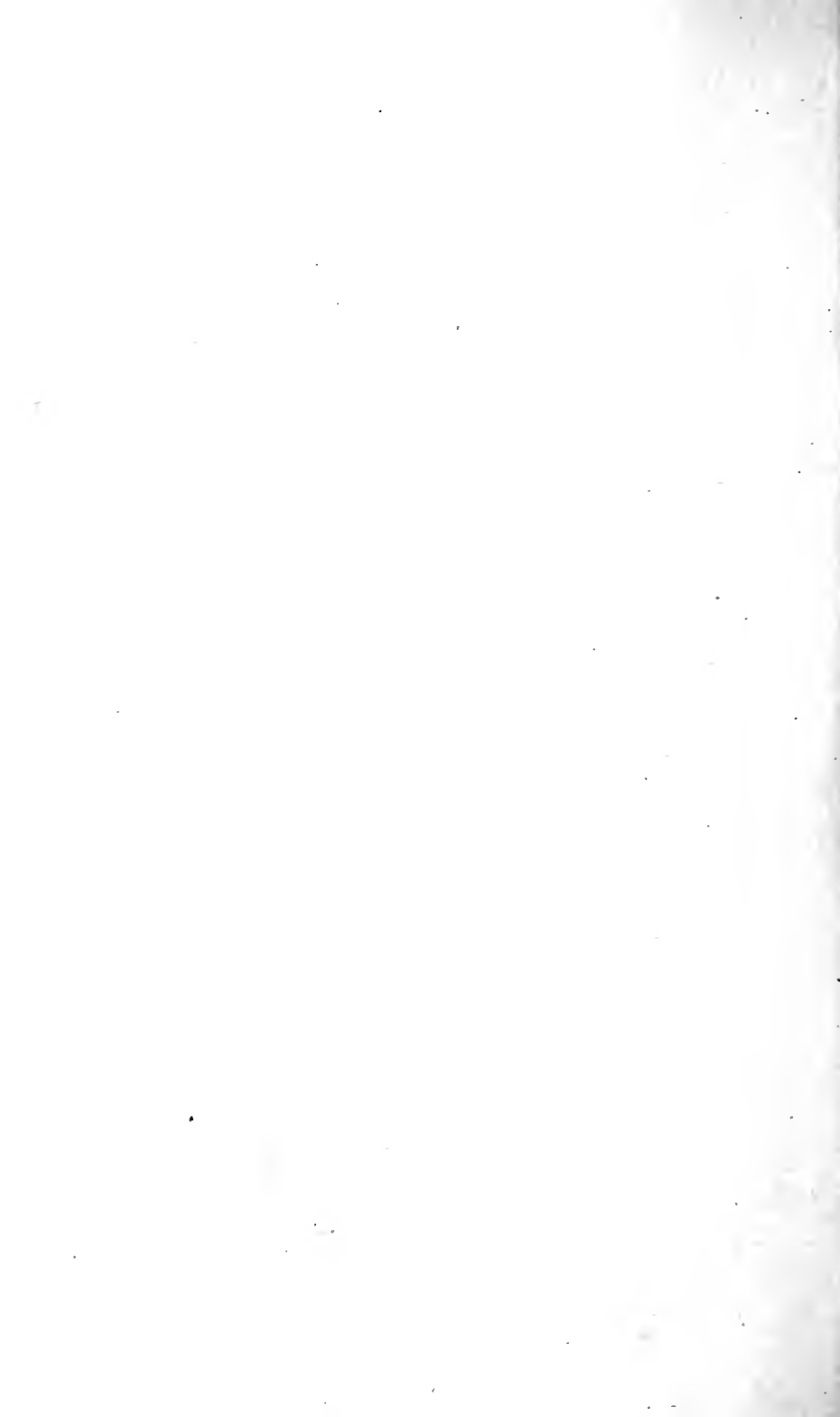
CITATIONS

Cases:

| | Page |
|---|--------|
| <i>Abel v. Loughman</i> , 1 F. R. D. 734..... | 17 |
| <i>American Fork & Hoe Co. v. Stumpit Corp.</i> , 125 F. (2) 472..... | 26 |
| <i>Anderson v. Lavelle</i> , 285 Mich. 194..... | 27 |
| <i>Bentley Stores Corp.</i> , 34 Fed. Supp. 732..... | |
| <i>Blair v. Joyner</i> , 156 N. C. 140..... | 27 |
| <i>Brown v. Miller</i> , 108 N. C. 395..... | 26 |
| <i>Carroll v. James</i> , 162 N. C. 510..... | 5 |
| <i>Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.</i> , 254 Fed. 553.... | 28 |
| <i>Chesapeake Transit Co. v. Mott</i> , 169 Fed. 543..... | 29 |
| <i>Chicago Metallic Mfg. Co. v. Edicard Katzinger & Co.</i> , 123 F. (2) 518..... | 23 |
| <i>Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co.</i> , 25 F. Supp. 332..... | 22 |
| <i>Crowe v. Peaslee-Gaulbert Co.</i> , 37 F. (2) 216..... | 29 |
| <i>Davin v. Dowling</i> , 146 Wash. 137..... | 26 |
| <i>DeFilippis v. Chrysler Sales Corp.</i> , 116 F. (2) 375..... | 21, 23 |
| <i>DeLahanty v. Newark Morning Ledger Co.</i> , 26 F. Supp. 327..... | 22 |
| <i>Denver & R. G. W. Ry. v. Linck</i> , 56 F. (2) 957..... | 29 |
| <i>DeVaughn v. Harris</i> , 103 Ga. 102..... | 26 |
| <i>Doyle v. Union Bank & Trust Co.</i> , 102 Mont. 563..... | 27 |
| <i>East Moline Co. v. Weir Plow Co.</i> , 95 Fed. 250..... | 27 |
| <i>Equitable Life Assurance Society v. Winn</i> , 137 Ky. 641..... | 24, 25 |
| <i>Europe, The</i> , 190 Fed. 475..... | 15 |
| <i>Glymont, The</i> , 66 F. (2) 617..... | 14 |
| <i>Gold Dust Corp. v. Hoffenberg</i> , 87 F. (2) 451..... | 15, 17 |
| <i>Guardian Trust Co. v. Kansas City So. Ry.</i> , 28 F. (2) 233..... | 17 |
| <i>Haackinson Co. v. Goodman</i> , 32 F. Supp. 732..... | 21 |
| <i>Healer v. Pearce</i> , 59 Nebr. 583..... | 27, 30 |
| <i>Hodgman v. Atlantic Refining Co.</i> , 20 F. (2) 949..... | 29 |
| <i>Hughes v. Moore</i> , 7 Cranch. 176..... | 20 |
| <i>In re Salmon Weed & Co.</i> , 53 F. (2) 335..... | 24 |
| <i>Kelso v. Maclaren</i> , 122 F. (2) 867..... | 21 |
| <i>Klinzing v. Blauw Bros., Inc.</i> , 160 N. Y. Supp. 631..... | 24 |
| <i>Lafeyth v. Emporia Nat. Bank</i> , 53 Kan. 51..... | 26 |
| <i>Lientz v. Wheeler</i> , 113 F. (2) 767..... | 26 |
| <i>Long v. Crawford Finance Co.</i> , 18 Oh. op. 252..... | 26 |
| <i>Lord v. Pathe News</i> , 97 F. (2) 508..... | 28 |
| <i>Lowe v. Wing</i> , 56 Wis. 31..... | 26 |
| <i>Lynch v. Naylor</i> , 63 Ill. App. 107..... | 5 |
| <i>McCann v. Bentley Stores Corp.</i> , 34 F. Supp. 234..... | 21 |
| <i>Martin v. Morales</i> , 102 N. J. Eq. 535..... | 24 |
| <i>Milton v. Richardson</i> , 21 Misc. 380..... | 24 |
| <i>Mountain Copper Co. v. United States</i> , 142 Fed. 625, appeal dis- missed, 212 U. S. 587..... | 27 |
| <i>Nicholson Transit Co. v. Bassett</i> , 42 F. Supp. 990..... | 23 |
| <i>Northwestern Equipment Co. v. Sofe</i> , 91 Wash. 118..... | 27 |
| <i>Olsen v. Muskegon Piston Ring Co.</i> , 117 F. (2) 163..... | 19 |
| <i>Pine River Co. v. United States</i> , 186 U. S. 279..... | 29 |

Cases—Continued.

| | Page |
|---|------------|
| <i>Reconstruction Finance Corp. v. Menihan</i> , 312 U. S. 81----- | 15 |
| <i>Simms v. Andreac</i> , 118 F. (2) 803----- | 26 |
| <i>Solomon v. Welch</i> , 28 F. Supp. 823----- | 29 |
| <i>State ex rel. Armour Packing Co. v. Dickman</i> , 146 Mo. App. 396-- | 30 |
| <i>Taylor v. Swift & Co.</i> , 2 F. R. D. 424----- | 22 |
| <i>Terral v. Burke Construction Co.</i> , 257 U. S. 529----- | 18 |
| <i>Trinidad Creamery Co. v. McDonald</i> , 82 Colo. 328----- | 27 |
| <i>United States v. Barker</i> , 2 Wheat. 394----- | 14 |
| <i>United States v. Boyd</i> , 5 How. 29----- | 14, 19 |
| <i>United States v. Chemical Foundation</i> , 272 U. S. 1----- | 14, 17, 19 |
| <i>United States v. Dunbar</i> , 83 Fed. 151----- | 14, 21 |
| <i>United States v. French Sardine Co., Inc.</i> , 80 F. (2d) 325----- | 14, 19, 29 |
| <i>United States v. Jardine</i> , 81 F. (2) 747----- | 29 |
| <i>United States v. Knowles' Estate</i> , 58 F. (2) 718----- | 14 |
| <i>United States v. Mock</i> , 149 U. S. 273----- | 27 |
| <i>United States v. National Biscuit Co.</i> , 25 F. Supp. 329----- | 15, 21 |
| <i>United States v. Sanborn</i> , 135 U. S. 271----- | 29 |
| <i>United States v. Sherwood</i> , 312 U. S. 584----- | 15 |
| <i>United States v. So. Pacific R. R.</i> , 56 Fed. 865----- | 29 |
| <i>United States v. Verdier</i> , 164 U. S. 213----- | 29 |
| <i>United States v. Withers</i> , 130 Fed. 696----- | 27 |
| <i>United States v. Worley</i> , 281 U. S. 339----- | 14 |
| <i>Welter v. du Pont</i> , 1 F. R. D. 551----- | 21 |
| <i>Yanosh v. Earley</i> , 67 Pa. Sup. Ct. 585----- | 27 |
| Statutes: | |
| 28 U. S. C. (1940 ed.) § 723c, p. 2642----- | 15 |
| Rev. Stat. § 983, 28 U. S. C. § 830----- | 17 |
| Rev. Stat. § 968, 28 U. S. C. § 815----- | 29 |
| 55 Stat. 265----- | 17 |
| Pub. L. No. 644, 77th Cong. 2d Sess----- | 17 |
| Miscellaneous: | |
| 1 C. J. S. § 41, p. 684----- | 24 |
| 1 C. J. S. § 42, p. 687----- | 24 |
| 11 C. J. S. § 517----- | 5 |
| 27 C. J. S. §§ 44, 85; pp. 204, 274----- | 22 |
| Federal Rules of Civil Procedure: | |
| Rule 1----- | 20 |
| Rule 41 (a)----- | 17, 21 |
| Rule 54 (d)----- | 15 |
| Hale, "Unconstitutional Conditions and Constitutional Rights" | |
| (1935), 35 Col. L. Rev. 321----- | 18 |
| 18 Hughes, <i>Federal Practice</i> (1940) § 23432----- | 20 |
| McCormick, <i>Handbook on the Law of Damages</i> (1935) § 61----- | 17 |
| Same, §§ 22, 24----- | 27 |
| Notes of Advisory Committee on Rules to Rule 54 (d)----- | 15 |
| Restatement, <i>Torts</i> (1939) § 907----- | 27 |
| Sedgwick, <i>Damages</i> (9th ed. 1912)----- | 16 |



In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10340

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION,
APPELLEE

*UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE EASTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION*

BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended, 28 U. S. C. § 41 (1), upon the ground that the United States is party plaintiff (R. 2). The jurisdiction of this court rests on Section 128 of the Judicial Code, as amended, 28 U. S. C. § 225, giving the circuit courts of appeal jurisdiction to review final decisions of the district courts.

STATEMENT OF THE CASE

This is an appeal from a judgment of District Judge Schwellenbach, rendered on July 6, 1942, dis-

missing with prejudice the complaint of the United States in an action for an accounting.

The complaint filed by the United States on January 22, 1941, in the District Court of the United States for the Eastern District of Washington, Northern Division, set up twenty separate causes of action against Pacific Fruit & Produce Company of Seattle, Washington. Typical of these was the third cause of action, which involved the following undisputed facts as found by the courts:

In 1936 and 1937, the United States through the Farm Security Administration (formerly the Resettlement Administration) loaned money upon promissory notes to George M. Brisky and Evelyn Brisky of Chelan County, Washington, taking as security a crop and chattel mortgage which gave the United States a first lien on all fruit crops produced or to be produced by the Briskys during 1937 upon specified real property (R. 219-221). The sum of \$770.11 remains due and owing to the United States on these notes, with interest thereon at the rate of 5 per cent per annum until paid (R. 221, 224).

The funds advanced to the Briskys by the United States were insufficient to finance the entire cost of producing and marketing their 1937 fruit crops, and the additional funds needed for such purpose were obtained from defendant upon the security of a lien on those crops (R. 224-225). To enable these additional advances to be made, the United States agreed to subordinate its lien upon the Briskys' 1937 fruit crop to the lien in favor of defendant, but such subordination was expressly "limited to the extent of

60 cents per box on all fruit sold by the mortgagors" (R. 225-226). The subordination agreement gave defendant "the right to deduct and receive from all sales made by the said mortgagors of their 1937 fruit crops the sum of 60 cents per box from each sale made by them" until the loan made by the defendant shall have been paid in full, and the agreement gave the United States "a first lien on all proceeds from each and every sale of any part of the mortgagors' 1937 fruit crops after the deduction of 60 cents per box from the proceeds of each sale has been made" by defendant (R. 225, 226). Thereafter, defendant advanced funds and rendered services to the Briskys to aid them in financing the production, handling, or marketing of their 1937 fruit crops, and the Briskys delivered to defendant their entire 1937 crop, consisting of 1,137 boxes of apples (R. 226).

Each of the twenty causes of action in the complaint related to a different borrower, set up the amount due the United States from that borrower and described the land upon which he was to raise the 1937 fruit crop mortgaged to the Government. All twenty causes of action were otherwise the same, alleging that the Government's mortgage on the 1937 fruit crop of the borrower had been subordinated in favor of defendant to the extent of 60 cents per box and that the entire 1937 crop of each borrower had been delivered to defendant (see Appendix, p. 31, *infra*). The complaint prayed that defendant be ordered to render a full accounting of the transactions between it and each of the borrowers named in the twenty causes of action, relating to the production, handling, and sale of their

1937 fruit crops; the sums advanced and the services rendered or charges incurred in behalf of each borrower; the quantity and quality of the 1937 fruit crops delivered by each borrower to defendant; the proceeds of each sale of such crops; and the amount defendant was authorized to deduct therefrom as reimbursement for funds advanced and services rendered to the borrower. The complaint also prayed "that plaintiff have judgment against the defendant for any sums or balances found to be due to the plaintiff upon such accountings, and that the plaintiff have such other and further relief as may be just, together with costs of this action" (R. 12-13).

Defendant's motion to dismiss every cause of action (R. 39) was denied (R. 40), and defendant thereupon filed an answer, alleging that the United States had released its lien on the 1937 crops of the borrowers, and that defendant had advanced funds to each borrower and "purchased the entire crop from each of the borrowers and accounted in full to the borrowers for all fruit delivered to it" (R. 44).

The matter came on for trial before Judge Schwel lenbach on April 28, 1942, and by the court's direction only the third cause of action was tried (R. 46), the judgment in that cause to be "applicable to the other causes of action contained in the plaintiff's complaint" (R. 219, 229).

At the trial, plaintiff contended that the Government's first lien on the Briskys' 1937 fruit crops, as modified by the subordination agreement, required that all proceeds received by defendant from each separate sale of the fruit in excess of 60 cents per box must be

paid over to the Government before deduction of any charges such as warehousing, freight, storage, and the like (R. 51-54). Plaintiff further contended that although Government agents had examined defendant's books, they could not ascertain to whom nor at what price defendant had sold the Briskys' fruit and that defendant had never furnished any additional information on this score (R. 52-53). Defendant contended, on the other hand, that it had purchased the fruit from the Briskys outright and was required to apply against Briskys' debt to defendant only the sale price as between them, so that the price defendant received for the fruit from subsequent purchasers was legally immaterial (R. 54-57). The court ruled, for the purposes of the trial, that the subordination agreement contemplated sales to third persons, and not sales by the Briskys to defendant (R. 138).¹

Defendant's ledger sheets were introduced in evidence, showing the sums advanced and services rendered to the Briskys and the amount credited to them for sales of fruit to defendant, but giving no indication of what disposition defendant had made of the fruit (R. 76, 197-199). Plaintiff adduced evidence that defendant as a rule had commingled Briskys' fruit with the fruit of other growers and had shipped the commingled fruit to defendant's different branches throughout the country (R. 62-66), although

¹ Where a mortgagee purchases the mortgaged property from his mortgagor, a junior lienor is entitled to have the fair market value of the property credited upon the senior lien irrespective of the sale price fixed between mortgagor and mortgagee. *Lynch v. Naylor*, 63 Ill. App. 107; *Carroll v. James*, 162 N. C. 510, 77 S. E. 337; 11 C. J. § 517, p. 711.

in a few instances defendant sold the fruit to outsiders (R. 68). Defendant's accountant testified that it was virtually impossible to trace the ultimate sales of Briskys' fruit made by defendant's branches (R. 140, 141, 144, 168). The court ruled that since defendant had received mortgaged property with knowledge of the Government's lien, it was under an obligation to show its disposition and the amount received therefor; and that if by mixing Briskys' fruit with other fruit and shipping the combined fruit to branch houses defendant rendered it impossible to trace Briskys' fruit or ascertain its selling price, plaintiff may prove its fair market value at the date of such shipment (R. 134-135, 138, 143, 145). The court further ruled that unless adequate evidence was adduced by defendant as to when those shipments were made, the market value of the fruit as of one week after defendant received it, which is a reasonable time, may be proved, but defendant may negative such evidence by other factors (R. 161, 172).

Records brought to court by defendant's officers were then introduced, showing shipments and sales of Briskys' fruit made by defendant (R. 146-158, 165). These accounted for 298 boxes out of a total of 1,137 boxes of Briskys' fruit delivered to defendant (R. 169, 226-227). Plaintiff's demand that defendant be ordered to account for the disposition of the remaining fruit (R. 168) was denied as untimely (R. 169).

Plaintiff then attempted to qualify a Government agent as an expert on the market value of the fruit during the period in question, but was unsuccessful because the court ruled that the witness could not base

his reply solely on reports issued by the Bureau of Agricultural Economy, Department of Agriculture, as to sales of fruit in the vicinity during that time (R. 173-174; 175-179). An attempt to qualify other witnesses failed (R. 182-183). Thereupon, Government counsel moved for a voluntary nonsuit (R. 184), arguing that the inability of the Government's witness to qualify as an expert on market values was a surprise and not due to lack of diligence; that the Government's inability to bring in other witnesses at that time prevented arriving at an adequate formula in what was essentially a test case; that the case is far reaching and affects the financing of the apple crop as well as the methods used by the Government in subordinating its lien to other lenders; and that in fairness to the growers as well as to defendant, a proper trial of the matter should be had (R. 184-187). The defendant opposed this motion and moved for dismissal with prejudice because the Government had not adequately prepared its case and had put defendant to tremendous expense (R. 186). The court then stated (R. 185-186):

I wouldn't consider granting the motion [of plaintiff] without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another lawsuit until the Government has paid something.

The court then ruled that if this suit involved only one instead of twenty causes of action, plaintiff's motion to dismiss without prejudice would be denied and the case decided on its merits, but since the case involved a matter of general policy and Governmental

assistance to growers and warehousemen, plaintiff's motion without prejudice would be granted, on condition that the United States pay defendant \$250.00 within 45 days to reimburse it for its expenses in preparing for trial; otherwise the entire complaint would be dismissed with prejudice (R. 192-195). In response to defendant's objection that the figure was too low, the court admitted that it was impossible to arrive "at the proper figure of just compensation," and that the \$250.00 was "more or less an arbitrary figure" picked "out of the air" (R. 195), but added that if defendant had won the case on the merits, it would have no compensation at all (R. 195). The court also admitted that "it's impossible to determine how much the defendant has been compelled to spend as the result of preparation of this case" (R. 192-193).

An order of dismissal was then entered on April 29, 1942, reciting that if plaintiff should pay defendant \$250.00 within 45 days "to reimburse it for funds expended in preparation of its defense," the action would be dismissed without prejudice; otherwise it would be dismissed with prejudice (R. 215-216).

On June 25, 1942, defendant moved for dismissal with prejudice, upon an affidavit that plaintiff had failed to pay the \$250.00 (R. 217). On July 2, 1942, plaintiff moved for a continuance to allow further introduction of evidence as to market value at the time of conversion, or alternatively, for an order dismissing the action without prejudice (R. 218).

On July 6, 1942, the court entered Findings of Fact and Conclusions of Law, finding that the Briskys owed plaintiff \$770.11 on promissory notes secured by a first

mortgage lien on their 1937 fruit crop; that plaintiff had subordinated its lien to defendant to secure additional advances to the Briskys by defendant, such subordination being limited to 60 cents per box on all fruit sold; that defendant had advanced funds and rendered services to the Briskys to aid in financing the production, handling, and marketing of their 1937 fruit crop; that defendant received 1,137 boxes of apples from the Briskys and converted 298 boxes thereof to its own use; and that no proof was submitted as to whether defendant converted any of the remaining boxes or as to the value of fruit converted by defendant (R. 219-227). The Conclusion of Law was that the action should be dismissed with prejudice (R. 228). On the same date the court entered a judgment reciting that plaintiff had failed to comply with the preliminary order of April 29, 1942, and dismissed the entire complaint with prejudice (R. 229-230). The United States appealed (R. 230-231).

QUESTIONS INVOLVED

1. Whether the District Court erred in conditioning the granting of the Government's motion for a dismissal without prejudice upon the payment of \$250.00 to defendant by way of reimbursement for funds expended in the preparation of its defense.

2. Whether the District Court erred in dismissing the entire complaint with prejudice because of the Government's failure to comply with such condition.

3. Whether the District Court, after a trial of one of the twenty causes of action alleged in the complaint, and after making findings of fact under that cause of

action that defendant had converted 298 boxes of fruit, erred in dismissing the entire action with prejudice.

SPECIFICATION OF ERRORS

1. The District Court lacked authority to condition the right of the United States to dismiss its action without prejudice upon the payment of \$250.00 as reimbursement to defendant for the costs incurred in the preparation of its defense.

2. The District Court erred in dismissing the complaint of the United States with prejudice because of its failure to pay the sum of \$250.00 to defendant.

3. The District Court erred in finding that only 298 boxes of apples had been converted.

4. The District Court erred in dismissing all twenty causes of action of the complaint though a hearing had been conducted only in respect to the third cause of action thereof.

5. The District Court, after finding that defendant was guilty of conversion, erred in dismissing the complaint with prejudice and in failing to enter judgment for plaintiff for at least nominal damages.

6. The District Court erred in failing to cause defendant to produce complete records as to the sale and disposition of the fruit mortgaged to plaintiff, as called for in the subpoena obtained by plaintiff.

7. The District Court erred in holding, in an action which was basically one for an accounting, that the burden was on the United States rather than upon defendant to establish the prices for which the mortgaged fruit had been sold.

8. The District Court erred in entering judgment for defendant.

SUMMARY OF ARGUMENT

I

The court below was in error, in requiring that plaintiff reimburse defendant in the sum of \$250.00 for expenditures incurred in the preparation of its defense, as a condition to granting plaintiff's motion for dismissal of the complaint without prejudice. The Government could not have been directly ordered to pay this sum to defendant because the United States is immune from the imposition of costs, and there is no other basis upon which judgment in any amount could have been rendered against plaintiff. Hence, although the Government's motion for voluntary dismissal without prejudice was addressed to the court's discretion, the court could not properly require the Government to waive one of its sovereign immunities, exemption from costs, as a condition to exercising the court's discretion in favor of the Government.

Even if the condition requiring payment of \$250.00 to defendant was legal, the court abused its discretion in not unconditionally granting plaintiff's motion to dismiss without prejudice, or in the alternative, granting plaintiff a continuance. Twenty separate causes of action were involved in the complaint against twenty different borrowers who owed the Government a total of almost twenty thousand dollars, secured by a mortgage on their 1937 fruit crops. The third

cause of action was selected by order of the court as a test of the others, and in that cause plaintiff established conversion by defendant of 298 boxes of apples, although it was unable to prove their fair market value at the date of conversion. In view of the recognized public interest in the outcome of the litigation, and the fact that the cause of action tried was to be the test of the others, the court should have either granted the Government a voluntary dismissal without prejudice or continued the trial to enable the Government to produce the necessary expert witnesses. The latter course would have avoided the expense of another trial, which was the sole reason for the imposition of the condition that the Government pay defendant \$250.00. The abuse of discretion in appending that condition—one impossible for plaintiff to meet—is heightened by the circumstance that plaintiff's failure to comply therewith resulted in dismissal with prejudice of twenty causes of action involving almost \$20,000, notwithstanding that defendant was found guilty of conversion in the test cause of action.

II

The court erred in dismissing all twenty causes of action with prejudice. Even if the condition imposed by the court upon its granting of plaintiff's motion for dismissal without prejudice was valid, plaintiff's failure to comply with that condition should have been followed by a disposition of the case on the merits pursuant to defendant's motion to dismiss with prejudice.

The action sought an accounting of facts peculiarly within the knowledge of defendant—the disposition and proceeds of the 1937 fruit crop mortgaged to the United States and delivered by the mortgagors to defendant. After defendant produced the records showing the disposition and proceeds of 298 boxes, the court should have granted plaintiff's demand that defendant be ordered to produce similar records as to the remainder. Moreover, having found conversion by defendant of the 298 boxes of fruit as to which defendant had produced some records, it was error for the court not to have found conversion as to all other boxes of mortgaged fruit delivered by the Briskys to defendant.

In any event, since the court found that defendant had converted 298 boxes of fruit, plaintiff's failure to prove the market value of such fruit and hence the actual amount of damages sustained by reason of such conversion should have resulted in the award of nominal damages to the Government. The failure to make such an award prejudiced substantial rights of the United States, by determining conclusively against it nineteen separate causes of action even though the principle of defendant's liability had been established in the test cause of action. Moreover, if the United States had been awarded nominal damages, it would have been entitled, as the prevailing party, to recover costs against defendant. Consequently, the failure to award nominal damages to plaintiff on the third cause of action constituted reversible error.

ARGUMENT

I

The court below erred in conditioning the dismissal of the complaint without prejudice upon plaintiff's reimbursing defendant in the sum of \$250

1. The Government could not have been ordered to pay this sum to defendant

The immunity of the United States from costs in the absence of a statute to the contrary is established beyond question. *United States v. Barker*, 2 Wheat. 394; *United States v. Worley*, 281 U. S. 339, 344; *United States v. Chemical Foundation*, 272 U. S. 1, 20; *United States v. French Sardine Co., Inc.*, 80 F. (2) 325 (C. C. A. 9); *United States v. Knowles' Estate*, 58 F. (2) 718 (C. C. A. 9); *The Glymont*, 66 F. (2) 617, 619 (C. C. A. 2).² This exemption, which is predicated upon the immunity of the sovereign from unconsented suit, protects the United judgment is rendered against it as the defendant in the suit (*United States v. Worley*, 281 U. S. 339, 344), but also when it is unsuccessful as the plaintiff. *United States v. Chemical Foundation*, 272 U. S. 1, 20; *United States v. Boyd*, 5 How. 29, 51; *United States v. Dunbar*, 83 Fed. 151 (C. C. A. 9).

These principles have not been altered by the Rules of Civil Procedure for the Federal District Courts.

² Since the United States itself is the plaintiff in the case at hand, the ruling in *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, is inapplicable. Costs were there allowed against the Reconstruction Finance Corporation because the statute creating it, which enabled it to sue and be sued, was construed to carry liability for costs as a natural and appropriate incident of legal proceedings.

Rule 54 (d), which excludes the imposition of costs against the United States except "to the extent permitted by law," is "merely declaratory and effected no change of principle." *Reconstruction Finance Corp. v. Menihan*, 312 U. S. 81, 83; *cf. United States v. Sherwood*, 312 U. S. 584, 590. Consequently, unless a statute otherwise provides,³ nothing in the federal rules permits costs to be assessed against the Government upon the dismissal of its complaint. *United States v. National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y.).

Hence, if judgment on the merits had been rendered for defendant at the close of the trial, without plaintiff's intervening motion for dismissal, the court below could not have ordered plaintiff to pay \$250 to defendant as reimbursement for its expenditures in defending the suit, in the guise of costs or otherwise; and this was acknowledged by the court below (R. 192, 195). And the fact that the court found defendant guilty of converting 298 boxes of fruit in violation of plaintiff's lien thereon (R. 226-227) would suffice to preclude it from costs regardless of the sovereign capacity of the plaintiff. *Cf. The Europe*, 190 Fed. 475, 481 (C. C. A. 9); *Gold Dust Corp. v. Hoffenberg*, 87 F. (2d) 451 (C. C. A. 2). There was of course no counterclaim or other demand by defendant against plaintiff, and no other theory has been suggested upon which judgment in any amount could have been rendered against plaintiff.

³ For a collection of statutes providing for costs against the United States in specified situations, none of which are applicable here, see Notes of Advisory Committee on Rules to Rule 54 (d); 28 U. S. C. (1940 ed.) § 723c, p. 2642.

2. The condition attached to the granting of plaintiff's motion for dismissal without prejudice was an abuse of discretion

Since the United States could not have been ordered to pay \$250 to defendant as costs or otherwise, it is submitted that the granting of a voluntary dismissal without prejudice may not be conditioned upon the making of such payment.

Recognizing the sovereign's immunity from costs,⁴ the court below did not thus characterize the exaction of \$250 which it required the United States to pay to defendant in order to obtain a dismissal without prejudice. Instead, the preliminary order of dismissal entered at the close of the trial recited that defendant "has necessarily expended considerable money in the preparation of its defense," and directed that, as a condition to dismissal of the action without prejudice, plaintiff pay defendant \$250—admittedly an "arbitrary figure" picked "out of the air" (R. 195)—"to reimburse it for funds expended in the preparation of its defense" (R. 216). But partial reimbursement of the prevailing party for his expenses of litigation is the very objective of the allowance of costs,⁵ and as shown above plaintiff is immune from costs as a matter of law.⁶

Although the court below had discretion to grant or deny the Government's motion for dismissal without

⁴ The court said (R. 192): "Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word."

⁵ Sedgwick, *Damages* (9th ed. 1912), § 230.

⁶ Even as costs, the assessment of \$250 might be questioned. The costs allowed in the federal district courts include "the bill of fees of the clerks, marshal and attorney, and the amount paid

prejudice, and had the power to impose proper terms and conditions upon the granting of such a motion (Rule 41 (a) (2)), it is contended that, insofar as the United States is concerned, the terms and conditions can only be those to which the Government is fairly subject and with which it has power to comply. Without Congressional authorization, no officer of the Government may consent to the imposition of costs. *United States v. Chemical Foundation*, 272 U. S. 1, 20. The payment of an exaction from which the Government had sovereign immunity and which it was impossible for the Government to pay⁷ is, we submit, an improper and illegal condition. The situation is analogous to that in which governmental authority conditions the grant of a privilege which it has the right to

printers and witnesses, and lawful fees for exemplification of copies of papers." Rev. Stat., § 983, 28 U. S. C., § 830. Costs in actions at law do not normally include counsel fees, travel costs, or any other outlay incident to the preparation or trial of the case, except where provided by statute or contract specifically contemplating such allowance. McCormick, *Handbook on the Law of Damages* (1935), § 61, pp. 236, 237. Even in suits of an equitable nature where the court exercises its discretionary power to allow costs beyond the statutory scale, the allowance generally occurs only against a party who has vexatiously instituted groundless litigation or instituted suit in bad faith. Cf. *Guardian Trust Co. v. Kansas City So. Ry.*, 28 F. (2) 233 (C. C. A. 8); *Gold Dust Corp. v. Hoffenberg*, 87 F. (2) 451 (C. C. A. 2); *Abel v. Loughman*, 1 F. R. D. 734 (E. D. N. Y.).

⁷ The Department of Justice Appropriation Acts for the fiscal years 1942 (55 Stat. 265, 294) and 1943 (Pub. 644, 77th Cong. 2d Sess.), from which expenses of litigation are paid, were available for expenses "in courts other than Federal courts." There is no suggestion of any other appropriation to which the United States could properly have charged the \$250.

withhold upon terms which there was no power to impose directly, an exercise of power commonly held to be illegal.⁸

3. Plaintiff's motion for a dismissal without prejudice or for a continuance should have been granted unconditionally

Even if the condition requiring payment of \$250 could validly have been imposed upon the United States, it is submitted that in the circumstances of this case, it was an abuse of the trial court's discretion not to grant unconditionally plaintiff's motion for a dismissal without prejudice or, in the alternative, for a continuance.

Twenty separate causes of action were here involved, seeking an accounting of the disposition and proceeds of the 1937 fruit crops delivered to defendant by twenty different borrowers who owed the United States a total of \$19,738.98, secured by a mortgage on those crops (see Appendix, p. 31, *infra*). At the court's direction, the third cause of action involving a claim of only \$770.11 was selected for trial as the test case, the judgment in that cause to be applicable to the other nineteen causes (R. 219, 229). In the test cause of action, the United States established conversion of 298 boxes of fruit by defendant (R. 227) but was unable to prove the market value of such fruit. The court recognized the public interest in this litigation and in vindicating the Government's lien upon the crops (R. 190-191), and these

⁸ *Of.* Hale, "Unconstitutional Conditions and Constitutional Rights" (1935), 35 Col. L. Rev. 321, 344; *Terral v. Burke Construction Co.*, 257 U. S. 529, 532-533.

considerations impelled the court to “grant” the Government’s motion for non-suit instead of passing upon the merits of the case (R. 190).

The only factor which led the court to impose the condition that plaintiff pay defendant \$250 was the expense to defendant which a second suit would entail (R. 192–193). But expense to the other litigant is immaterial where the United States is the opposing party. As the court below recognized (R. 195), the Government’s traditional immunity from costs applies even though its unsuccessful suit has resulted in a substantial expense to defendant in defending the litigation.⁹ The application of this principle is especially compelling in the present case since, as the court below observed (R. 195), at least part of the time spent on the trial by defense counsel would not be wasted at a new trial. And the fact that a dismissal without prejudice might lead to a second suit upon the same subject matter is of course the entire purpose of such a dismissal; that circumstance alone clearly cannot constitute grounds for its denial.¹⁰

Moreover, if the dual expense of two trials were to be avoided, the court below had merely to grant plaintiff’s alternative motion for a continuance (R. 218), to enable plaintiff to obtain a qualified expert on market

⁹ This was unquestionably the situation in decisions upholding the federal immunity from costs, such as *United States v. Boyd*, 5 How. 29, 51; *United States v. Chemical Foundation*, 272 U. S. 1, 20; *United States v. French Sardine Co., Inc.*, 80 F. (2d) 325 (C. C. A.).

¹⁰ *Olsen v. Muskegon Piston Ring Co.*, 117 F. (2d) 163 (C. C. A. 6).

value in order to supply evidence as to the amount of damages suffered from defendant's conversion. Such procedure would have secured the "just, speedy, and inexpensive determination" of the action which the new Federal rules were intended to achieve (see Rule 1). And the Government's substantial interest in preserving an action in which defendant's liability had been established in its favor by the finding of conversion, confirms plaintiff's *bona fides* in seeking a continuance or a nonsuit.

When the effect of the denial of plaintiff's motion is appraised, the abuse of the court's discretion becomes even more patent. Because of inability to prove the amount of damages in one cause of action involving a claim of only \$770—a cause of action in which the court found defendant guilty of conversion—all twenty causes of action involving total claims of almost \$20,000 were dismissed with prejudice, thereby barring further proceedings on nineteen independent causes of action which were not tried. Because the equities were so clearly with plaintiff in these circumstances,¹¹ we submit that the court's denial of plaintiff's motion, except upon condition that plaintiff reimburse defendant \$250, constituted an abuse of discretion justifying reversal by this court. cf. *Kelso v. Maclaren*, 122 F. (2d) 867 (C. C. A. 8).¹²

¹¹ Cf. *Hughes v. Moore*, 7 Cranch. 176, 189; see Hughes, *Federal Practice* (1940) § 23432.

II

The court erred in dismissing all twenty causes of action with prejudice

1. Upon plaintiff's failure to pay defendant \$250, the court should have decided the case as though plaintiff's motion for dismissal without prejudice had not been made

Even if the condition imposed by the court below upon granting plaintiff's motion for dismissal without prejudice was proper, the court erred in dismissing the entire complaint with prejudice when plaintiff failed to comply with that condition.

By the court's order, the third cause of action was selected for trial out of the twenty causes of action in suit, the judgment therein to be applicable to the others (R. 46, 187, 190, 219, 229). Since each of the twenty causes of action set up in the complaint in-

¹² To support its condition upon the grant of plaintiff's motion for dismissal without prejudice, the court below cited *Welter v. DuPont*, 1 F. R. D. 551 (D. Minn.); *McCann v. Bentley Stores Corp.*, 34 F. Supp. 234, 235 (W. D. Mo.); *Hawkinson Co. v. Goodman*, 32 F. Supp. 732 (S. D. Cal.); and *DeFilippis v. Chrysler Sales Corp.*, 116 F. (2d) 375 (C. C. A. 2). All these cases involve private litigants; no case has been found in which a court required the United States to pay costs or expenses to defendant in order to obtain a dismissal under Rule 41 (a). Indeed, since the adoption of the new federal rules, it has been held that costs cannot be granted upon the dismissal on defendant's motion of an action brought by the United States (*United States v. National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y.)) as this court had held before the new rules on sustaining a demurrer to the Government's complaint. *United States v. Dunbar*, 83 Fed. 151 (C. C. A. 9). The cases cited by the court below are also factually distinguishable in that none of them involved a trial of one count as a test of multiple counts in the complaint.

volved different borrowers, a different crop and a different amount due the United States (see Appendix, p. 31 *infra*), the judgment in the test cause of action was plainly intended to establish defendant's liability *vel non*, so that the amount of damages could then be determined for each separate cause of action. In the test cause, the theory of liability was decided in favor of plaintiff (R. 134-135, 138, 143, 145, 172), and the issue of liability was likewise decided in its favor when the court found that defendant had converted 298 boxes of fruit (R. 226-227).

Assuming (without conceding) that the court below properly conditioned a dismissal without prejudice upon plaintiff's paying \$250 to defendant in reimbursement for expenditures "in the preparation of its defense" (R. 216), plaintiff's noncompliance with that condition should have led to a denial of plaintiff's motion and disposition of the case as though plaintiff's motion had never been made.¹³ There was no legal justification whatever for dismissing the complaint with prejudice solely because of the Government's

¹³ Where a motion at the trial to dismiss without prejudice is denied, the court will resume the trial or proceed to decide the case on the merits. *Delehanty v. Newark Morning Ledger Co.*, 26 F. Supp. 327 (D. N. J.); *Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Mfg. Co.*, 25 F. Supp. 332 (D. Del.); *Taylor v. Swift & Co.*, 2 F. R. D. 424 (S. D. Fla.). Compare the situation in which a motion for a nonsuit is granted unconditionally and then set aside; in such circumstances, the case is reinstated and stands "as though it had never been dismissed," the plaintiff being restored to all its rights. 27 C. J. S., §§ 44, 85; pp. 204, 274. Plaintiff's rights can be no less where its motion for nonsuit is denied initially.

failure or refusal to comply with the condition.¹⁴ At that posture of the case, defendant had moved to dismiss with prejudice, which was equivalent to a common-law demurrer to plaintiff's evidence;¹⁵ consequently, the court could properly have decided the cause on the merits. And on the merits, plaintiff was clearly entitled to judgment either for a full accounting under all twenty counts, or for nominal damages in conversion under the third count, with a resumption of the trial to determine the amount of damages in the remaining nineteen causes of action.

2. The court below erred in not requiring a full accounting by defendant

The causes of action alleged in the complaint were equitable in nature, seeking an accounting from a lienor who had disposed of property upon which plaintiff also had a lien, and praying for judgment in the amount found to be due after satisfaction of defendant's limited prior rights under the subordination agreement (R. 12-13). The court below ruled that defendant was under a duty to account to plaintiff for the proceeds received from the sale of the Briskys' fruit, over and above defendant's first lien thereon

¹⁴ The case of *DeFilippis v. Chrysler Sales Corp.*, 116 F. (2d) 375 (C. C. A. 2), in which the complaint was dismissed with prejudice after plaintiff failed to pay defendant \$250 as the condition imposed upon the dismissal without prejudice, is not in point. There the motion to dismiss occurred *before* trial; consequently, there was no record, as here, to support any decision on the merits other than one favoring the defendant.

¹⁵ *Chicago Metallic Mfg. Co. v. Edward Katzinger & Co.*, 123 F. (2d) 518, 519 (C. C. A. 7); *Nicholson Transit Co. v. Bassett*, 42 F. Supp. 990, 991 (N. D. Ill.).

(R. 134-135, 138), and that if defendant did not disclose the dates and proceeds of the sales of the Briskys' fruit, plaintiff could prove its fair market value as of a reasonable time after it was delivered to defendant (R. 143, 145, 161, 172).¹⁶ Defendant thereupon accounted for the disposition of 298 boxes, producing records showing the branch or purchaser to whom they had been shipped (R. 169). Plaintiff then demanded that defendant produce its records as to the disposition of the remainder of the Briskys' 1937 crop, all of which had been delivered to defendant (R. 168). The court sustained defendant's objection to this demand on the ground that it was not timely (R. 169). This was plainly error, for the cause of action was in terms one for an accounting, seeking the production of information solely within the knowledge and control of defendant. The court could properly have ordered defendant to account for the remainder by producing the necessary records showing shipments and proceeds received.¹⁷ It could also have rendered judgment for plaintiff in the amount of any balance due from defendant, as determined in the accounting.¹⁸ The court should, therefore, have ordered de-

¹⁶ Where defendant fails or has rendered it impossible to account for the proceeds of mortgaged property to a junior lienor, the fair market value may be used as the basis for plaintiff's recovery. *Klinzing v. Blauw Bros. Inc.*, 160 N. Y. Supp. 631; *cf. In re Salmon Weed & Co.*, 53 F. (2) 335 (C. C. A. 2).

¹⁷ *Cf. Milton v. Richardson*, 21 Misc. 380, 47 N. Y. Supp. 735; 1 C. J. S., § 41, p. 684.

¹⁸ *Martin v. Morales*, 102 N. J. Eq. 535, 142 Atl. 31; *Equitable Life Assurance Society v. Winn*, 137 Ky. 641, 126 S. W. 153; 1 C. J. S., § 42, p. 687.

defendant to account in full, as prayed in the complaint, for the proceeds of the entire 1937 fruit crop delivered to defendant by the Briskys, upon which the United States had a first lien as to all proceeds in excess of 60 cents per box.

3. The court below erred in not finding conversion of all the fruit delivered to defendant

The court below found that 1,137 boxes had been delivered to defendant by the Briskys and that defendant had converted 298 to its own use (R. 226-227). It further found that there was "no proof submitted as to whether or not defendant converted any of the remaining boxes of apples" (R. 227). This, we submit, was error. The 298 boxes found to have been converted were covered by records produced by defendant, disclosing the disposition or sales price thereof. If conversion was found as to these, it was obviously error to find that there was no conversion as to boxes for which no figures whatever were produced by defendant. The failure to account for the disposition of property received may in such circumstances be deemed an admission of its conversion. *Cf. Equitable Life Assurance Society v. Winn*, 137 Ky. 641, 126 S. W. 153. The court's ruling had the effect of placing a premium upon defendant's refusing to perform its adjudicated duty to account. In view of the undisputed facts that defendant received and disposed of 1,137 boxes of fruit upon which it had only a limited first lien, and refused to account for the proceeds of more than 298 boxes, the court should have found con-

version by defendant as to all the 1,137 boxes in question.¹⁹

4. The court erred in not awarding plaintiff nominal damages for defendant's conversion of 298 boxes of fruit

Although in form the Government's action was for an accounting, in substance it could also be regarded as one for conversion. *Cf. Davin v. Dowling*, 146 Wash. 137, 262 Pac. 126. The court below so considered it (R. 134-135, 172) and made a finding of fact that defendant had converted 298 boxes of fruit (R. 228). Such characterization of the cause of action involved was entirely proper, for a mortgagee may sue a senior lienor for conversion of the proceeds of mortgaged personal property which the latter had sold without accounting to the claimant for the balance due to him.²⁰ Moreover, since there is only one form of civil action under the new federal rules (Rule 2), the theory of action may be changed freely to conform to the facts adduced, with appropriate amendment of the pleadings if necessary.²¹ The court having found under the third cause of action that defendant con-

¹⁹ Although the amount of damages was not proved as to the fruit found to have been converted, the failure to find conversion as to all of the Briskys' fruit was prejudicial because it adversely affected plaintiff's substantive rights under the remaining nineteen causes of action, to which the judgment in the third cause was to be applicable.

²⁰ *Lafeyth v. Emporia Nat. Bank*, 53 Kan. 51, 35 Pac. 805; *Long v. Crawford Finance Co.*, 18 Oh. Op. 252, 6 Oh. Supp. 36; *Brown v. Miller*, 108 N. C. 395, 13 S. E. 167; *Lowe v. Wing*, 56 Wis. 31, 13 N. W. 892; *DeVaughn v. Harris*, 103 Ga. 102, 29 S. E. 613.

²¹ *American Fork & Hoe Co. v. Stampit Corp.*, 125 F. (2) 472, 474 (C. C. A. 6); *Lientz v. Wheeler*, 113 F. (2) 767, 769 (C. C. A. 8); *Simms v. Andrew*, 118 F. (2) 803, 807 (C. C. A. 10).

verted 298 boxes of fruit but that there was no evidence as to the value of such fruit (R. 227), plaintiff under well-settled principles was entitled to judgment for at least nominal damages on its third cause of action.²²

5. Failure to award nominal damages to plaintiff is reversible error because substantial rights of plaintiff were impaired thereby

The erroneous failure of a trial court to award nominal damages to a plaintiff and the rendition of judgment for the defendant, is generally not ground for reversal unless the protection of a substantial right or the interests of justice so require.²³ In the case at hand, the court's refusal to award a judgment for nominal damages to the United States was reversible error because it prejudiced a substantial right of the Government in nineteen other causes of action involving almost \$20,000 in claims, and deprived the United States of its right to recover costs as the prevailing party.

²² *Trinidad Creamery Co. v. McDonald*, 82 Colo. 328, 259 Pac. 1028; *Yanosh v. Earley*, 67 Pa. Sup. Ct. 585; *Northwestern Equipment Co. v. Soje*, 91 Wash. 118, 157 Pac. 459; McCormick, *Damages* (1935 ed.), § 22; Restatement, *Torts* (1939), § 907.

The right to recover nominal damages, of course, applies to the United States, when suing as plaintiff, in the same way as to any prevailing private litigant. *United States v. Mock*, 149 U. S. 273; cf. *Mountain Copper Co. v. United States*, 142 Fed. 625 (C. C. A. 9), appeal dismissed, 212 U. S. 587.

²³ *United States v. Withers*, 130 Fed. 696 (C. C. A. 2); *East Moline Co. v. Weir Plow Co.*, 95 Fed. 250 (C. C. A. 7); *Anderson v. Lavelle*, 285 Mich. 194, 280 N. W. 729; *Doyle v. Union Bank & Trust Co.*, 102 Mont. 563, 59 P. (2) 1171, 1180; *Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615; *Blow v. Joyner*, 156 N. C. 140, 72 S. E. 319, 320; McCormick, *Damages* (1935 ed.), § 24.

(a) *Prejudice to nineteen other causes of action.*—

In view of the directions of the court that the third cause of action be tried as a test case and that the judgment therein be applicable to the other nineteen causes of action (R. 219, 229), the adjudication of plaintiff's right to recover for the conversion found in the third cause of action, even if accompanied by an award of only nominal damages, would have been of definite advantage to the Government by establishing a similar right of recovery in the other nineteen causes of action. The substantive liability having once been adjudicated, there would have remained solely the task of determining the amount of damages in each of the other causes of action.²⁴ Since the nominal damages in the third cause of action would thus have been of some practical benefit to plaintiff, by justifying the establishment of actual damages in the other nineteen causes of action, the dismissal of all twenty with prejudice after finding conversion in the test cause of action constituted reversible error.²⁵

²⁴ The court below, during the trial, expressed the opinion that the damages involved in the third cause of action might amount to only forty or fifty dollars under the construction of the subordination agreement urged by plaintiff (R. 191), but it is clear that the court was referring only to the 298 boxes whose disposition was accounted for by defendant. The total amount alleged to be due plaintiff from the borrowers involved in the other causes of action amounted to a substantial sum (see Appendix, p. 31, *infra*), and the Government now has available competent evidence as to market value of the 1937 crops delivered to defendant by these borrowers—the only factor which blocked the determination of the base below on the merits.

²⁵ *Lord v. Pathe News*, 97 F. (2) 508 (C. C. A. 2); *Chapin-Sacks Mfg. Co. v. Hendler Creamery Co.*, 254 Fed. 553, 559 (C. C. A. 4).

(b) *The United States as the prevailing party was entitled to costs.*—An additional circumstance which renders the failure to award nominal damages reversible error is the fact that the Government would have been entitled to costs if judgment had been entered in its favor.

The court below found defendant guilty of conversion, leaving open only the question of damages. This was necessarily an adjudication that defendant had invaded the substantive rights of the United States, a decision making the United States the prevailing party and entitling it to the recovery of costs,²⁶ irrespective of the amount of damages recovered.²⁷ The United States, although immune from costs, is entitled to them if it is the prevailing party.²⁸ Such right to costs, for which the Government had prayed in its complaint (R. 13), is a “substantive right and not a mere matter of procedure”. *United States v. French Sardine Co.*, 80 F. (2) 325, 326 (C. C. A. 9). The failure to allow

²⁶ *Cf. Denver & R. G. W. Ry. v. Link*, 56 F. (2) 957, 962 (C. C. A. 10); *Crowe v. Peaslee-Gaulbert Co.*, 37 F. (2) 216, 218 (C. C. A. 1); *Hodgman v. Atlantic Refining Co.*, 20 F. (2) 949, 951 (D. Del.); *Chesapeake Transit Co. v. Mott*, 169 Fed. 543, 548 (C. C. A. 3).

²⁷ The right of a prevailing party to recover costs is subject, in certain cases in the federal courts, to the exception that the plaintiff recover not less than \$500 exclusive of costs (Rev. Stat. § 968; 28 U. S. C. § 815), but the United States is expressly exempted from that requirement.

²⁸ *Pine River Co. v. United States*, 186 U. S. 279, 280, 296; *United States v. Verdier*, 164 U. S. 213, 219; *United States v. Sanborn*, 135 U. S. 271; *United States v. So. Pacific R. R.*, 56 Fed. 865 (C. C. A. 9); *United States v. Jardine*, 81 F. (2) 747, 748 (C. C. A. 5); *Solomon v. Welch*, 28 F. Supp. 823 (S. D. Calif.).

nominal damages where necessary to carry costs constitutes the denial of a substantial right for which the appellate court will reverse.²⁹

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, and that the case should be remanded to the district court with directions to take any of the following steps, in its discretion: (1) to dismiss the complaint without prejudice, or (2) to continue the trial in order to receive evidence of market value, or (3) to order defendant to account in full for the disposition and proceeds of the 1937 fruit crop delivered to it by the Briskys upon which plaintiff held a mortgage, or (4) to enter judgment for plaintiff on the third cause of action in the amount of nominal damages, and to proceed to trial of the remaining nineteen causes of action on the issue of damages.

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EDWARD M. CONNELLY,
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Attorney.

²⁹ *State ex rel. Armour Packing Co. v. Dickman*, 146 Mo. App. 396, 124 S. W. 29; *Heater v. Pearce*, 59 Neb. 583, 81 N. W. 615.

APPENDIX

The twenty separate causes of action set up in the complaint filed by plaintiff in this matter are identical with the third cause of action (set forth in R. 2-13) except for paragraphs **III** to **VII**, inclusive. These specify the borrowers (Par. **III**), the loans made to them and the amount of indebtedness due therefrom to the United States (Pars. **III**, **IV**, **VII**), the date of execution of the crop and chattel mortgage to the United States conveying a first lien upon the 1937 fruit crops produced by the borrowers (Par. **V**), and the real property upon which such fruit crops are to be produced (Par. **VI**) (See R. 3-6).

The borrowers in the twenty causes of action, and their indebtedness alleged to be due to the United States at the date of filing the complaint, are as follows:

| Cause of action | Name | Date of mortgage | Amount |
|------------------|--------------------------------------|------------------|------------|
| First..... | Victor and Martha Beckman..... | June 7, 1937 | \$1,700.00 |
| Second..... | J. J. and Nellie Biggs..... | Apr. 14, 1937 | 1,015.13 |
| Third..... | George M. and Evelyn Brisky..... | Apr. 9, 1937 | 770.11 |
| Fourth..... | Ray H. and Alice Bumgarner..... | Apr. 14, 1937 | 802.63 |
| Fifth..... | Pearlie S. and Flossie Byrd..... | May 26, 1937 | 1,235.00 |
| Sixth..... | Homer and Bessie Duncanson..... | Apr. 19, 1937 | 656.09 |
| Seventh..... | H. W. and Gladys Dusseau..... | Apr. 26, 1937 | 1,110.63 |
| Eighth..... | Harold C. and Louise Enlow..... | Apr. 15, 1937 | 895.97 |
| Ninth..... | Burns Hardesty..... | Apr. 12, 1937 | 195.96 |
| Tenth..... | Everett H. and Phyllis Joy..... | Apr. 12, 1937 | 1,264.01 |
| Eleventh..... | George J. and Ethel Koehler..... | Apr. 12, 1937 | 805.00 |
| Twelfth..... | Bert and Carrie Kuhnert..... | May 8, 1937 | 609.35 |
| Thirteenth..... | James and Anna Kutil..... | Apr. 15, 1937 | 697.92 |
| Fourteenth..... | Dan Reiman..... | Apr. 29, 1937 | 2,056.21 |
| Fifteenth..... | J. L. and Eugenia Webster..... | May 7, 1937 | 947.29 |
| Sixteenth..... | S. B. and Lillian A. West..... | Apr. 14, 1937 | 1,059.09 |
| Seventeenth..... | Charles J. and Nellie Yenter..... | Apr. 9, 1937 | 830.00 |
| Eighteenth..... | George A. and Margaret L. Young..... | Feb. 9, 1937 | 1,085.21 |
| Nineteenth..... | George and Ella Hartwig..... | Apr. 19, 1937 | 523.80 |
| Twentieth..... | Albert and Elise Heinz..... | Apr. 14, 1937 | 1,479.52 |
| | | | 19,738.98 |

On April 30, 1943, counsel for the parties hereto entered into the following stipulation:

It is stipulated and agreed by counsel for the parties in the above-entitled matter, that the complaint filed therein by the United States of America, in the District Court of the United States for the Eastern District of Washington, Northern Division, on January 22, 1941, may be referred to by either party to this appeal, in the brief and argument of such party, to the same extent as if the said complaint were printed in full in the transcript of the record on this appeal.

No. 10340 3

**In The United States Circuit Court of Appeals
For The Ninth Circuit**

UNITED STATES OF AMERICA, *Appellant*

v.

PACIFIC FRUIT & PRODUCE COMPANY, a corporation,
Appellee

*UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION*

BRIEF FOR APPELLEE

FILED

JUN 10 1943

PAUL P. O'BRIEN,
CLERK

INDEX

| | PAGE |
|---|------|
| Statement of the Case..... | 1 |
| Questions Involved | 4 |
| Summary of Argument..... | 5 |
| Argument | 6 |
| I. Subordination agreement is to be construed in favor of Appellee | 8 |
| 1. As the agreement gave the right of sale there could be no conversion for selling..... | 7 |
| 2. Appellant retained nothing except a right for accounting | 6 |
| 3. Appellee was entitled to deduct 60 cents a box on entire crop | 7 |
| 4. Appellant, having failed to show that value of crop was more than the advancement, is entitled to no recovery | 9 |
| II. The Appellant must account for security other than crop..... | 10 |
| III. Motion to dismiss entire action and present order to return exhibits precludes any claim of error for dismissal..... | 11 |
| 1. Appellant cannot complain because the court dismisses entire action when he so moved..... | 12 |
| 2. Presenting order to return exhibits is inconsistent with objection to dismissal..... | 12 |
| 3. Motion for continuance must be made before resting..... | 12 |
| IV. To entitle a plaintiff to a continuance diligence must be shown | 14 |
| 1. No costs were imposed against Appellant..... | 12 |
| 2. Appellant failed to show any diligence in obtaining the evidence | 12 |
| 3. Appellant failed to show any diligence in obtaining expert witnesses | 14 |
| 4. There can be no surprise where no diligence is shown.. | 17 |
| Conclusion | 17 |

II

CITATIONS

| Cases: | PAGE |
|---|------|
| E. I. Du Pont de Nemours & Co. vs. Clairborne-Reno Co., 64 Fed. (2d) 224, 89 A.L.R. 238..... | 8 |
| Mikusch vs. Beeman, 110 Wash. 658, 188 Pac. 780..... | 8 |
| Schaad v. Robinson, 50 Wash. 283, 97 Pac. 104; 59 Wash. 346, 109 Pac. 1072..... | 11 |
| Solicitors Loan & Trust Co. vs. Washington & Idaho R. R. Co., 11 Wash. 684, 40 Pac. 344..... | 10 |
| Miscellaneous: | |
| 12 Am. Jur. 454..... | 14 |
| 12 Am. Jur. 469..... | 14 |
| 12 Am. Jur. 795..... | 8 |
| Cobbey on Chattel Mortgages, Sec. 991..... | 11 |
| Jones on Mortgages, Sec. 897..... | 11 |
| Overton on The Law of Liens, Sec. 11..... | 11 |
| 26 R.C.L. | 7 |

**In The United States Circuit Court of Appeals
For The Ninth Circuit**

No. 10340

UNITED STATES OF AMERICA, *Appellant*

v.

PACIFIC FRUIT & PRODUCE COMPANY, a corporation,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The United States Government, acting through the Farm Security Administration, took a mortgage on the crop of George M. Brisky and Evelyn Brisky, his wife, and upon a large amount of livestock and personal property used in connection with the farm (R. 23-26), for the sum of \$770.11. The Government was unwilling to finance the crop and as a result, the Briskys made an arrangement with the Appellee to complete such financing and the Government subordinated its mortgage on the crop to the extent of 60c per box (R. 35, 224-225), which was the estimated amount of

additional financing needed, but specifically retained its lien upon all of the other personal property covered by the mortgage (R. 37). By the terms of the subordination the Appellee was authorized to deduct from the sale price the amount of its advances up to 60c a box and the subordination purported to retain a lien upon the proceeds in excess thereof (R. 36). Thereafter the Appellee did advance 60c a box on the crop and purchased the entire crop. The Appellee on its ledger (Exhibit A) (R. 197-199) charged the Briskys with the amount of the advances and as the fruit was packed, credited the Briskys with the purchase price thereof. The net result, as shown by the ledger sheet (Exhibit A), was that the fruit was of less value than the amount of the advances and Appellee charged off to loss the excess of its advances (R. 199). The crops of the growers listed in the other nineteen causes of action in the plaintiff's complaint were handled in a similar manner.

At the close of the 1937 season, three representatives of the Farm Security Administration, namely, Howard A. Nessen, Regional Collection Adviser, B. R. Phipps, Farm Security Administration District Supervisor, and Henry Waller, came to the plant of the Appellee (R. 90) to ascertain whether or not there was any excess to which the Government was entitled (R. 91, 110). The Appellee made all of its records concerning the crop of these borrowers available to the United States Government and offered to them all the assistance they desired (R. 91, 97, 106, 115).

In January of 1941, the Appellant commenced an action against the Appellee, claiming a conversion of

the fruit of each of these twenty borrowers and prayed for an accounting. This action was only one of fourteen similar suits involving an extremely large number of borrowers in the aggregate.

As a result of the tremendous amount of time it would have taken to have tried the facts of each cause of action set forth in the fourteen cases, it was agreed that a typical cause of action should be selected by counsel in each action, and that the evidence would be submitted upon this one cause of action and the court would in this case make all of the necessary rulings and lay down the formula by which the amount of the recovery, if any, could be computed in the remaining causes of action. Accordingly, cause of action No. 3, involving the fruit of the Briskys was chosen in the instant case and it was upon this cause of action that the case was tried (R. 46).

The Appellant tried its case upon the theory that the Appellant converted the fruit as of the date that the Appellee disposed of the fruit (R. 51) and, except for the small amount of 298 boxes (R. 169), did not present any evidence of the date on which the apples were disposed of by the Appellee, nor did it have any evidence as to the condition or value of the fruit at that time (R.182). No showing whatsoever was made as to the disposition of any of the other property upon which the Appellant had a mortgage. After the Appellant rested, the Appellant moved for a voluntary non-suit of the entire action, without prejudice (R. 184-185). The court refused to grant such motion with-

out prejudice unless Appellant would make a voluntary contribution of \$250.00, to reimburse the Appellee (R. 195). Otherwise, he would dismiss it with prejudice (R. 195). Whereupon, on April 29, 1942, the Appellant presented an order to the court dismissing the suit upon the terms indicated and directing the Clerk to return the exhibits to the respective parties (R. 215-216). On July 2, 1942, after the expiration of the forty-five days provided in the court's original order, the Appellant moved for a continuance (R. 218), which was denied, and judgment was entered dismissing the action with prejudice (R. 219).

QUESTIONS INVOLVED

(1) Whether a contract prepared by one party on its own printed forms, with apparent inconsistencies, should be construed in favor of the party not preparing the form and against the party preparing such form.

(2) Whether a party having two items of security for its loan can enforce collection out of one of the items on which a third party has a claim, without first exhausting the other item.

(3) Whether the attorneys for the plaintiff, after resting on the first of twenty similar causes of action, can move the court for a dismissal of the entire twenty causes of action, and whether they, after the court has announced the terms and conditions upon which the action will be dismissed, can present an order to the court for dismissal upon those terms and conditions and include therein a further order for the return of all exhibits filed in the case, and then use such order as

a basis of appeal, claiming such order is reversible error.

(4) Whether a party can claim the refusal to grant a continuance on the ground of surprise is reversible error where the surprise was the inability of the party's own employee to qualify as an expert and the motion for the continuance was not made until more than two months after the trial had closed.

SUMMARY OF ARGUMENT

In addition to answering the argument of the Appellant, the Appellee urges the following reasons why the decision of the District Court should be affirmed.

I.

Any inconsistencies in the subordination agreement should be construed most favorably for the Appellee as it was drawn by the Appellant.

II.

The Appellant must first account for the security other than the crop before resorting to such crop security.

III.

The presentation by the plaintiff of an order dismissing the entire case and directing the return of all exhibits, without first having made a motion for a continuance or reserving exceptions to the court's ruling, precludes the plaintiff from claiming a reversible error for the entry thereof.

IV.

To be entitled to a continuance, the Appellant must show due diligence has been exercised in preparing its

case and the application must be timely made, and failure of Appellant's own employee to qualify as an expert is not justifiable surprise.

ARGUMENT

First: The Appellant in urging that the trial court committed an error, asserts that the Appellee converted 298 boxes of apples and, therefore, the Appellant was entitled to a judgment for nominal damages with costs. Much authority could be assembled to the effect that a mortgagee can bring an action for conversion against a third party who converts mortgaged property, and we have no quarrel with that doctrine. It is, however, not applicable in the instant case. This doctrine is based upon the wrongful seizure of mortgaged property. Here there was no such act. The subordination agreement contemplated the sale of this fruit to or through the Appellee. The subordination provides

“said Mortgagor is in need of additional funds for the purpose of * * * *marketing his fruit crop* and has applied to Pac. Fruit & Produce Co. Cashmere hereinafter called the Creditor for a loan for any or all of these purposes” (R. 36).

“* * * on all fruit sold by the Mortgagor, and does specifically agree that *the Creditor shall have the right to deduct* and receive from all sales made by the said Mortgagor * * * ” (R. 37).

“* * * the United States of America * * * shall have a *lien on all proceeds* * * * *after the deduction* of Sixty (\$.60) Cents per box from the proceeds of such sale has been made *by the Creditor*” (R. 37). (Italics ours.)

All that the Government retained was a right for an ac-

counting, as the subordination clearly gave a right to sell, and where there is a right to sell there can be no conversion for selling. Conversion contemplates a wrongful act.¹ It is therefore respectfully submitted that the Appellee did not and could not convert the 298 boxes of apples.

It was the position of the Appellant throughout the entire trial that the Appellee converted the fruit at the time it disposed of the same and that the Appellant could recover the value of the fruit as of that date, less 60c per box. The Appellant acknowledged that it had no evidence to offer relative to the value of the fruit at the time it contended the conversion took place (R. 182, 184). Assuming that a conversion was possible, then the conversion must have been the proceeds in excess of 60c a box as that is what the Government attempted to retain a lien on and there is no evidence that such an excess ever existed.

It will be noted that the subordination agreement (R. 37) provides, “* * * that such subordination shall be limited to the extent of 60c per box *on all fruit sold by the mortgagor* * * *”, and again, that the Appellant “* * * shall have a *first lien on the proceeds* from each and every sale * * *” (Italics ours.)

¹ 26 R. C. L. 1098

“Conversion Defined.

Conversion is any distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein, such as a tortious taking of another’s chattels, or any wrongful exercise or assumption of authority, personally or by procurement, over another’s goods, depriving him of the possession, permanently or for an indefinite time. The act must be essentially tortious.”

It was the contention of the Appellant that all apples that sold for less than 60c per box was the Appellee's loss, and all apples that sold above 60c was the Appellant's profit. It was and is the contention of the Appellee that when the Appellant subordinated its mortgage to the extent of 60c per box on all fruit, that that gave the Appellant the right to recover his advances before making any accounting to the Appellant, providing his advances were limited to 60c per box. It is a matter of common knowledge that all fruit will not grade the same and is, of course, a physical impossibility to advance up to 60c for spraying and harvesting a crop on the apples that are going to grade high enough to demand in excess of 60c, and lesser amounts according to what the apples will grade, and if the Appellant's contention is to be upheld, it simply would mean that no creditor could advance a sum greater than what the lowest quality fruit would produce. Otherwise, they must inevitably suffer a loss with no prospects whatsoever of profit. If the Appellant's contention is to be sustained, these two clauses

² 12 Am. Jur. 795:

"Doubtful language in contracts should be interpreted most strongly against the party who uses it."

Mikusch v. Beeman, 110 Wash. 658; 188 Pac. 780:

"The language employed in the contract being that of defendants, it should be construed more strongly against them than against plaintiffs. 6 R.C.L. 854."

E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co. (CCA 8), 64 Fed. (2d) 224, 89 A.L.R. 238, writ of certiorari denied in 290 U.S. 646, 78 L. ed. 561; 54 S. Ct. 64:

"The language of a contract will be construed most strongly against the party preparing it."

are not consistent, and under the well-recognized doctrine that any inconsistencies are to be construed against the party preparing the contract,² the Appellant's contention must be rejected and it must be held that the Appellee is entitled to the entire proceeds up to the amount of their total advances. Exhibit A shows that it was necessary for the Appellee to actually charge off a portion of its advances as the fruit did not sell for enough to reimburse the Appellee (R. 199).

Second: The Appellant throughout its brief, keeps reiterating that the judgment in this case has prevented the Appellant from collecting practically \$20,000.00 justly due it, this being the total amount the Appellant loaned to the debtors involved in the twenty causes of action against the Appellee. This is not the fact. The Appellee does not owe that \$20,000.00 to the Appellant and never has owed it. All that the Appellee was required to pay under the terms of the subordination agreement was the value of the fruit less its advances and Exhibit A (R. 199) shows Appellee did not even get back its advances. It must be remembered that this was a 1937 apple crop which was completed in the spring of 1938 and the Appellant had three of its representatives examining the books of the Appellee and yet no action was taken to enforce any such collection until January, 1941. The chattel mortgage which the Appellant had covers not only this crop but what appears to be some very substantial security (R. 23), and if the Appellant was as desirous of collecting the monies due to the Government as it would have the court

believe, the whole or substantial portion could be collected, but so far as a record is concerned there is nothing to show that the Appellant has made the slightest effort to collect this money other than to bring this belated action against the Appellee. It is also a matter of common knowledge that the fruit growers are making substantial profits, and if the Appellant wishes to collect its money, it can no doubt do so.

Assuming but not admitting, that the Appellant's position is correct, we find a situation where the Appellee has only one source from which it can recover the advances made to the grower in order to enable him to market his fruit, namely, from the fruit, whereas the Appellant has two sources from which it can collect its money, one from the personal property mortgaged, other than the crop, and second, from the excess above the 60c. We believe it to be a uniform doctrine that where a debtor has two creditors, and one of the creditors has two sources from which it can collect its debt, and the other creditor has only one of them, that the creditor having the two sources must first exhaust the security not available to the less favorable creditor, and only take the security to which the less favorable creditor is entitled for any excess of the debt.³ We are, therefore, respectfully submitting that the Appellant was required to account for the

³ *Solicitors Loan & Trust Co. v. Washington & Idaho R. R. Co.*, 11 Wash. 684; 40 Pac. 344:

Mortgagor conveyed part of his property and the court in holding that it must sell the mortgaged property in parcels, selling what mort-

value of the security which it held before taking from the Appellee its only security for its indebtedness.

Third: Appellant further complains that the court dismissed the entire action with prejudice instead of

gagor still retained first, quoted from an Illinois case saying,

“* * * This protects the interest of the purchaser of the part, and makes the mortgagor but pay his own debt out of his own land.”

Schaad v. Robinson, 50 Wash. 283; 97 Pac. 104; 59 Wash. 346; 109 Pac. 1072:

The mortgagee released a portion of the land for less than its value after other parties had acquired a lien on the unreleased portion. The Court provided that the liens of these third parties must be paid out of the proceeds of the sale before any application could be made on the mortgage debt.

Cobbey on “Chattel Mortgages” Sec. 991: “Where a part of the property mortgaged is subject to other liens the court may in the interest of such lienholders, require the mortgage to exhaust the property upon which he has the sole lien first if such requirement will not injure the mortgagee.”

“When mortgages, held by senior and junior incumbrances, cover in part the same property, and the mortgagor is insolvent and the entire property is sufficient to pay both debts, the junior mortgagee may compel the senior mortgagee to exhaust the fund on which he alone held a lien, before resorting to that one covered by both mortgages.”

Jones on “Mortgages,” Sec. 897: “The holder of a junior mortgage upon one of two lots embraced in a prior mortgage may compel the prior mortgagee to resort in the first place to the other lot, upon which there is no other incumbrances.”

“If the junior mortgage covers only a portion of the lands embraced in the senior mortgage, and the senior mortgagee released from his mortgage, that portion of the property not covered by the junior mortgage, he will not be permitted to enforce his security against the premises common to both mortgagees unless he will first deduct the value of the parcel so released.”

Overton on “The Law of Liens,” Sec. 11: “Where a lien is common to two or more creditors and one of the creditors has a lien on separate property, equity will require the separate lien to be enforced first.”

either dismissing it without prejudice or granting a continuance. Unfortunately for the Appellant's contention, the Appellant after resting, moved the court to dismiss the entire action and did not ask for a continuance. At the conclusion of the argument thereon, the court made a conditional dismissal of the suit, and the attorneys for the Appellant presented the order for such dismissal. This order further provided for the return of the exhibits to the respective parties. The portion of the order providing for the return of the exhibits is a definite acquiescence in the disposition made by the court at the time, and precluded any idea or thought of the renewal of the instant action, and it was not until after the time limit on the court's preliminary dismissal had expired, so that only a final order was necessary to clear the records, that the motion for a continuance was ever presented to the court. We do not believe that the Appellant's attorneys should be permitted to lead the court into a reversible error, and if the entry of that order is a reversible error, which we do not concede, then it must be held that the attorneys for the Appellant invited the error and cannot now take advantage of it, nor was the motion for continuance timely.

Fourth: Appellant contends that the court imposed costs against the Government when the Appellant is immune from costs. The court did not impose any costs against the Appellant and no judgment for costs was rendered against the Appellant at the time of the preliminary order, or now. The Appellant's motion is

under *Rule 41 of the Rules of Civil Procedure*, and is directed to the sound discretion of the court, and by the terms of that rule, the court is authorized to impose such terms and conditions as the court deems proper. The upholding of the contention of the Appellant that the court is without authority to impose terms on the Government as a condition precedent to granting a dismissal without prejudice, will not be a doctrine favorable to the Government. The announcement of such a rule would merely be to encourage trial courts to dismiss suits with prejudice under similar circumstances, and that would have been the result in this case as the trial court said "I wouldn't consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn't start another law suit unless the Government has paid something" (R. 186). The reason that prompted the rule against permitting plaintiffs from dismissing suit without prejudice without the order of the court, and then only on such terms and conditions as the court deemed proper, is to compel the plaintiff to adequately prepare the case so that a defendant is not put to needless expense, (cases cited by trial court R. 188) and the record in the instant case shows from its very inception a total inexcusable lack of preparation on the part of the Appellant.

In the spring of 1938 at the close of the 1937 apple season, three officials or employees of the Resettlement Administration, went to the Appellee's warehouse for the supposed purpose of ascertaining whether the Gov-

ernment was entitled to any of the proceeds of the mortgagor's crop. At that time, all of the records concerning the receipt and disposition of fruit were made available to the Appellant's representatives. The three representatives were all present at the trial, and testified and unanimously agreed that the Appellee furnished them every facility to make a thorough and complete investigation.⁴ If they did not do so, that is the Appellant's negligence, not the Appellee's.

Concerning the preparation of the case, the trial court said:

"You can't make a demand like this binding on anybody. You can't issue a subpoena saying, 'bring in all your records.' There is some responsibility on people starting law suits to know what they want. I will refuse the demand on the ground it wasn't made timely" (R. 169).

"It seems to me with all the facilities of the United States Government in preparing this case for trial over a period of two or three years they could have gotten somebody in Wenatchee qualified to testify from his knowledge what the market price was at that time. When you get down to it all this witness has testified is what he has taken off these reports." (R. 179.)

⁴ 12 Am. Jur. 454:

"* * * a party who might have been prepared for trial will very seldom be granted a continuance because he is not prepared, and certainly in such a case the exercise of the court's discretion will not be disturbed."

12 Am. Jur. 469:

"The rule is practically universal that a continuance will not be granted to enable a party to obtain the testimony of an absent witness unless it appears that the applicant has used due diligence to procure the attendance of such witness or to obtain his testimony."

“I wouldn’t consider granting the motion without some substantial payment of costs. Costs are not taxable against the United States. I would just say you couldn’t start another law suit until the Government has paid something—” (R. 186).

“This case has been pending a long time. It should have been prepared. The defendant has been put to the expense, and should not have been put to the expense. Now the rule is the Government is not responsible for costs, and there is no way the Government can be compelled to pay costs in the ordinary sense of the word. These young men went out to examine the books, and did not examine the books.” (R. 192.)

“With all the facilities the Government has at its disposal and all the people in the Wenatchee Valley competent to testify as to market values, it certainly isn’t justifiable for the Government to come in with one witness and say ‘I’m sorry but we can’t prove it and therefore give us a voluntary dismissal and we’ll start all over again’ and put the defendant to the expense of preparing it again. I will say, frankly, if this case is started again, and the trial starts out the same way this has, without any preparation it just isn’t going to trial.” (R. 193.)

B. R. Phipps, one of these representatives testified that it was his duty during the progress of the season to keep a check to see that the growers were receiving proper return on their fruit, and he was acquainted with what Appellee was paying during the course of the season (R. 130-131), yet there is not a hint of any protest to the method of accounting of the Appellee, nor to the way its records were kept or any other matter concerning the marketing of fruit. Were the Appellant a private industry, every court would hold that

it was estopped from now challenging the acts of the Appellee. The records show that from five to six hundred carloads of apples annually pass through this one warehouse and the records thereof are most voluminous. At the close of the season when ordinary business would have called for the adjustment of an account, these records were available, and when three representatives of the department check Appellee's books, we submit that Appellee was entitled to assume that Appellant got the data it desired.

In 1941 the Government commenced suit and for the first time challenged the whole method of handling the transaction. The case did not come on for trial until more than a year after the complaint was filed. The plaintiff made no effort to obtain the information necessary to support the allegations of its complaint. The case was set for trial on Tuesday, April 28, 1942, in Spokane, Washington, some 130 miles from the warehouse of the Appellee. The Saturday evening preceding the trial, a subpoena duces tecum requiring the Appellee to bring to court all of its records concerning the fruit acquired from the Briskys was served. It was a physical impossibility to comply with the terms of the subpoena, and when counsel for the Appellant made a demand in open court for the compliance of the subpoena, the court denied the demand upon the ground that the service of the subpoena was not timely (R. 169).

The Appellant, even though it based its entire theory upon its right to recover upon the market value of apples at a particular time, did not have any witnesses available who were competent to so testify. The only

witness who was brought for that purpose was one of the three representatives who was supposed to have audited the Appellee's books. He has been associated with that department of the Government in direct connection with the financing of the orchards in the Wenatchee Valley from the very inception of the Government's program. The Government should have known whether the witness was qualified to testify upon the point on which its entire case rested, and without which testimony the Appellant's case must necessarily fail. In the immediate vicinity, there are innumerable numbers of available witnesses who could have qualified as experts, and the Appellant had no right to come into court with only one of its own employees who, as it developed, had no qualifications at all, and then say they were surprised. That is not justifiable surprise; it is plain lack of preparation.

CONCLUSION

It is respectfully submitted that this cause must be affirmed for the reasons (1) that Appellant wholly failed to produce any evidence entitling it to recover; (2) that the Appellant wholly failed to show any justifiable reason why it could not have produced evidence at the trial, if such evidence existed, entitling the Appellant to recover, and (3) if it should be held that the trial court committed any error in the dismissal of said case, such error was invited by the Appellant.

Respectfully submitted,
 RYAN, ASKREN & MATHEWSON
 HOWARD W. SANDERS
Attorneys for Appellee.
 545 Henry Building
 Seattle, Wash.

No. 10340

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

**PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION,
APPELLEE**

PETITION OF THE UNITED STATES FOR A REHEARING

FILED

NOV 18 1943

**PAUL P. O'BRIEN,
CLERK**

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10340

UNITED STATES OF AMERICA, APPELLANT

v.

PACIFIC FRUIT & PRODUCE COMPANY, A CORPORATION,
APPELLEE

PETITION OF THE UNITED STATES FOR A REHEARING

*To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Comes now the United States of America, the appellant in the above-entitled cause, and presents this, its petition, for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

I

On October 18, 1943, this Court rendered an opinion affirming a judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, which had been rendered on July 6, 1942. The District Court, at the close of plaintiff's case at trial, and on motion of the defendant, had entered a judgment dismissing with prejudice an action for an accounting brought by the United States of America against Pacific Fruit & Produce Company.

(1)

The case had been treated as one for conversion by the trial court, which found that the defendant had converted 298 boxes of apples on which the United States held a mortgage, subject to a limited lien in favor of defendant. The record also showed by uncontroverted testimony that 153 boxes of such apples had been sold by defendant for more than 60¢, the amount of its lien, the difference between the sales price and 60¢ representing the damage to plaintiff from the wrongful conversion, amounting in all to \$23.45 on the test cause of action alone.

It is respectfully submitted that in view of the record and the findings in the lower court, the dismissal with prejudice was clearly erroneous. Besides denying the United States a recovery to which it was clearly entitled as to 153 boxes of apples, and denying it the right to proceed to prove similar damages in nineteen other causes of action awaiting disposition of the test cause, the judgment deprives the Government of a right to costs as the prevailing party. Consequently, the dismissal was prejudicial to substantial rights of the Government.

Moreover, the result of the decision is a windfall to the Company from its own tortious act—already so adjudged—in appropriating, with knowledge of the Government's lien, the fruit crops of the twenty growers here involved without accounting to the growers, to the Government, or to anyone else for the proceeds. That there is such a windfall is to be seen from the proof, in the test cause of action, that the Company actually received more than the amount of its limited lien on 153 boxes of fruit mortgaged

to the United States. Even if we assume that counsel will fare no better in the other nineteen causes of action, and that the damages proven in the test cause of action are "typical," there is involved \$437. Accordingly, we respectfully request this Court to reconsider its decision affirming the judgment below.

II

We respectfully urge that this Court erred in treating the judgment for dismissal with prejudice as an act within the discretion of the trial court (Opinion pp. 1, 9, 12). The dismissal of an action *with prejudice* on motion of a defendant is an adjudication on the merits (F. R. C. P. 41 (b)),¹ and if on the merits, plaintiff is entitled to some relief, however slight, such a dismissal may not properly be granted.

At the close of the Government's case in the trial court, it moved for a dismissal without prejudice and the Company moved for a dismissal with prejudice. The original order entered by the court, permitting plaintiff to withdraw his action without prejudice on condition that it pay defendant \$250, might be considered a voluntary dismissal upon condition under Rule 41 (a) (2). But the original order together with its "invalid condition" has been held by this Court to be a "blank piece of paper." The later judgment dismissing the case with prejudice can not therefore be predicated thereon, but must be considered on its own merits. The entry of a judgment dismissing

¹ *Young v. United States*, 111 F. (2d) 823 (C. C. A. 9); *Berk v. Mathiason Shipping Co.*, 45 F. Supp. 851 (S. D. N. Y.); *Southwell v. Robertson*, 27 F. Supp. 244 (E. D. Pa.).

the case with prejudice in effect denied the Government's motion and granted the defendant's. Since the dismissal with prejudice was made upon motion of the defendant, it was an involuntary dismissal, governed by Rule 41 (b) of the Federal Rules of Civil Procedure. The procedure followed by the trial judge in setting out findings of fact and conclusions of law indicates that he considered it to be so governed (cf. *Young v. United States*, 111 F. (2d) 823, 825 (C. C. A. 9)).

The grounds for dismissals on the motion of defendant under Rule 41 (b) are (1) failure of plaintiff to prosecute, (2) failure of plaintiff to comply with the Rules or with any order of the court, or (3) after plaintiff has presented his evidence, his failure to show a right to relief.

In the instant case there had been no failure to prosecute, for the case was brought to trial and evidence was submitted. There had been no failure to comply with the Rules. Nor had there been a failure to comply with any valid order of the court. The only remaining ground upon which defendant could rest his motion is therefore that the evidence adduced by plaintiff had shown no right to relief.

This ground is not available here, since the court below found that defendant had converted 298 boxes of apples on which plaintiff had a mortgage lien, thus entitling plaintiff at the very least to nominal damages and to the costs which the complaint had demanded (Appellant's brief, p. 27, fn. 22). The right to costs is a substantial right, and the failure to award

appellant nominal damages, which automatically carry costs, therefore constituted reversible error (Appellant's brief, pp. 29, 30).

But the record shows more than nominal damages; it shows actual damages. The record contains the uncontroverted testimony of one of the defendant's chief accountants as to the price received by defendant for 277 boxes of apples found to have been converted. Of these, 153 boxes were shown to have been sold for more than the amount of the Company's lien (60¢ per box).² Some of these sales were interbranch transfers, and, according to defendant's manager, these were always made at the market price (R. 63). The others were private sales. As to these the rule is that property converted by wrongful sale is presumed to be worth

² The following table based on the undisputed and uncontroverted testimony of appellee's accountant (R. 139, 146-156) shows the price at which appellee disposed of 277 of the 298 boxes found by the court to have been converted (R. 227).

| No. of boxes | Size | Grade | Variety | Date | Price |
|--------------|---------------|-------|-------------------|---------|-----------------|
| 30 | 234 | F | Winesap | 1-22-38 | \$0.45. |
| 48 | 56-150 | XF | Delicious | 2- 1-38 | .82½-brokerage. |
| 26 | 125-150 | | ½ Winesap; ½ Del. | 2-10-38 | .75-brokerage. |
| 6 | All | XF | Delicious | 3- 2-38 | .90 |
| 46 | 138-163 | | Romes | 2-10-38 | .52. |
| 3 | | C | Delicious | 3- 2-38 | .45. |
| 5 | 130-165 | F | Romes | 3- 2-38 | .50. |
| 7 | | C | Delicious | 3- 5-38 | .42½-brokerage. |
| 12 | 163 | XF | Delicious | 3- 5-38 | .70 |
| 8 | Medium | F | Delicious | 3-12-38 | .55 |
| 2 | 88-96 | F | Winesap | 3-10-38 | .65 |
| 4 | 163 | XF | Winesap | 3-24-38 | .70-brokerage. |
| 11 | 163 & smaller | XF | Delicious | 4-13-38 | .75 |
| 25 | 216 | F | Delicious | 4-20-38 | .60-brokerage. |
| 30 | | XF | Romes | 3- 3-38 | .65 |
| 14 | 143 & larger | XF | Delicious | 2-26-38 | 1.00-brokerage. |

Brokerage, it was testified, averages \$.038 per box (R. 153).

the price received for it. (*Keiley v. Mechanics & Traders' Bank*, 72 Hun. 168, affirmed, 144 N. Y. 702; *McVeety v. Hayes*, 111 Wash. 457; *Junkin v. Anderson*, 12 Wash. (2d) 58.)

In light of this testimony, the finding below that no evidence had been submitted as to the value of the apples converted must be disregarded as being in direct conflict with the record (*Hooper v. First Ex. Nat. Bank of Coeur D'Alene*, 53 F. (2d) 593, 597 (C. C. A. 9)).

In accordance with the subordination agreement, of which the Company concededly had notice (R. 88, 138), the interest of the Government lay in whatever was realized on each box in excess of 60¢. The lower court specifically found that such subordination was limited to 60¢ per box and that the Government had a first lien after the Company had deducted 60¢ per box from the proceeds of each sale (R. 226). On the basis of the undisputed testimony, 153 of the 298 boxes were sold at prices in excess of 60¢ per box, the total of such excess, representing the damage to plaintiff, amounting to \$23.45. Plaintiff having shown a cause of action in conversion, and actual damages of at least \$23.45 at the time it rested, it was clearly error to give defendant judgment on the merits.

On no ground recognized by the courts was defendant entitled to such judgment. Plaintiff's lack of preparation, of which the trial court was so critical, in no way injured or prejudiced defendant. The fact that the Government did not prove all the damages that it might have against the Company in the court below did not give the latter a right to a de-

cision in its favor. The cases cited by this Court in its opinion as justifying the right to dismiss with prejudice where the plaintiff has been negligent in asserting his rights are not pertinent here; for they all deal with dismissals of action for failure to prosecute, i. e., for failure to bring the case to trial,³ whereas in the instant case, the action has duly been brought to trial and plaintiff has presented his case. The decision of this Court is in effect a holding that a litigant must at his peril prove the last jot and tittle of his right or lose all.

Rule 41 (b) makes no such requirement of a plaintiff. Defendant may only have plaintiff's case dismissed at the close of his evidence if there has been a complete failure to show any right to relief. The test is meritorious, not discretionary; and since under the most limited view of its evidence, plaintiff has shown a right to relief, the judgment for dismissal is not sustainable. Cf. *Young v. United States*, 111 F. (2d) 823 (C. C. A. 9); *Federal Deposit Ins. Co. v. Mason*, 115 F. (2d) 548 (C. C. A. 3); *Gary Theatre Co. v. Columbia Pictures Corp.*, 120 F. (2d) 891 (C. C. A. 7).

³ *Hicks v. Bekins Moving & Storage Co.*, 115 F. (2d) 406 (C. C. A. 9) (pleadings alone completed; case called without result sixteen times in twenty months); *Refior v. Lansing Drop Forge Co.*, 124 F. (2d) 440 (C. C. A. 6) (case pending six years); *Sweeney v. Anderson*, 129 F. (2d) 756 (C. C. A. 10) (plaintiff failed to appear at trial); *Congdon v. Aumiller*, 79 Wash. 616 (case pending eight years); *Kubli v. Hawckett*, 89 Cal. 638 (case pending five years); *Inderbitzen v. Lane Hospital*, 17 Cal. App. 2d 103, 106 (case not brought to trial until four years after initial filing).

III

The result of this erroneous judgment is to permit appellee to keep the fruits of its tortious acts in contravention of the rights of the growers and the Government. Appellee has taken as its own the apple crops of twenty separate growers, upon which it knew the Government had a lien, retaining all the proceeds from the sale of such crops, accounting to no one. Not only were the growers left in debt to the Pacific Fruit & Produce Company but their chattels were placed in danger of levy as the last remaining security for the loans made them by the Government. The Government received nothing. The judgment thus enriches defendant at the expense of the taxpayers and tends to discourage future loans of this nature by the Government.

Judge Schwellenbach pointed out the strong equities in favor of the Government (R. 191):

However, there is in this case a matter of general policy which I think I should take into consideration in passing on this motion. Here we have a case involving the assistance the Government rendered to the Wenatchee Valley in allowing the initial financing during the year 1937. I may be overly sensitive to the obligations of those who do business in the Wenatchee Valley, fruit men, including this defendant, should recognize toward the Government for the assistance that has been rendered to them during the last ten years. Nobody would be in business in the Wenatchee Valley and the Pacific Fruit and Produce Company would not be in business in the Wenatchee Valley were it not

for the fact the initial financing has been furnished by the Government. There wouldn't be enough orchards left in the valley to justify the operation of the apple business there.

Impatience with the ineptness of trial counsel, however justified it may be, should not be permitted to lead to so manifestly inequitable a decision.

For these reasons, it is respectfully urged that this petition for rehearing be granted, and that the judgment of the district court be upon further consideration reversed.

Respectfully submitted.

FRANCIS M. SHEA,
Assistant Attorney General.

EDWARD M. CONNELLY,
United States Attorney.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

CECELIA H. GOETZ,
Attorney.

NOVEMBER 1943.

CERTIFICATE OF COUNSEL

I, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

DAVID L. KREEGER,
Special Assistant to the Attorney General.

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

N. A. PEARSON,

Attorney for Appellant,

413 Arctic Building,

Seattle, Washington.

MESSRS. WELTS & WELTS,

MESSRS. HENDERSON & McBEE,

Attorneys for Appellee

Mount Vernon, Washington. [1*]

In the Superior Court of the State of Washington
for the County of Skagit

(District Court No. 16)

No. 17018

LAURENCE P. BUNNEY, as guardian of Wilmer
Bunney, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Defendant.

SUMMONS

The State of Washington

To the Said Associated Indemnity Corporation,
a corporation, Defendant, You and each of you are
hereby summoned and required to appear within
twenty days after the service of this Summons,
exclusive of the day of service, answer the com-
plaint of the plaintiff, and serve a copy of your
answer on the undersigned attorney for plaintiff,
at his office below stated, and defend the above en-
titled action in the Court aforesaid; and in case
of your failure so to do, judgment will be rendered
against you according to the demand of the com-
plaint, which will be filed with the Clerk of said

Court, a copy of which is herewith served upon you.

WELTS & WELTS

HENDERSON & McBEE

Attorneys for Plaintiff

Postoffice Address: Mount

Vernon, Skagit County,

Washington.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. by M. R. Rogers, Deputy. [2]

[Title of Superior Court and Cause.]

COMPLAINT

The plaintiff for cause of action against the defendant, alleges:

I.

That plaintiff is the duly appointed, qualified and acting guardian of the minor child, Wilmer Bunney, now of the age of fourteen years.

II.

That heretofore said minor through one Arthur Miles, as guardian ad litem, brought suit in the

Superior Court of the State of Washington from the County of Skagit in Cause No. 16431, against David Bunney and Clarence Bunney, doing business as Bunney Brothers, and Pound Motor Company, a corporation, the legal name of which was changed to Watkins Motor Company, for personal injuries suffered by said minor through the negligent operation and use by the said David Bunney of an automobile truck owned by said Bunney Brothers, together with necessary hospitalization and services of physicians and surgeons required for the care of said minor on account of said injuries, and on December 13, 1940, judgment was entered in said cause in favor of the plaintiff, Wilmer Bunney, and against all of said defendants, in the sum of \$3780.20, together with costs of trial in the further sum of \$37.00. This judgment the plaintiff as general guardian for said minor now owns, and said judgment is wholly unpaid and unsatisfied although [3] demand has been made upon this defendant to pay said final judgment.

III.

That after entry of said judgment, no appeal was taken or had therefrom by the defendants David Bunney and Clarence Bunney, doing business as Bunney Brothers. Appeal was taken from said judgment by the other defendant, and on said appeal the Supreme Court of the State of Washington held that as a matter of law, under the transactions had between Bunney Brothers and the other defendant, no completed sale of said motor truck

had been made to said motor company at the time of said injury, as delivery thereof was an essential part of said sale, and no delivery had been had, and said motor truck was used and operated by David Bunney at the time of injury of said minor, on behalf of the defendants David Bunney and Clarence Bunney, doing business as Bunney Brothers, and dismissed said action as against said motor company.

IV.

The defense of said suit against David Bunney and Clarence Bunney, doing business as Bunney Brothers, had been tendered to the defendant herein, which said defendant denied its liability and declined to defend said action.

V.

Prior to and at the time of said accident, the defendant Bunney Brothers were the owners of motor trucks which they operated on work of a nature requiring that a permit therefor be issued by the Department of Public Service of the State of Washington, known as the Department of Public Works, and they had procured such permits from the State of Washington and were operating their said trucks thereunder; and pursuant thereto, for a cash consideration and premium paid it, the defendant, Associated Indemnity Corporation, prior to the injury of said child as aforesaid, had issued and delivered to the defendants, Bunney Brothers, and there was in force at the time of said injury to said minor child a policy of liability insurance

executed by said defendant whereby and whereunder this defendant promised and agreed to pay any final judgment for personal injury to and including care of any person caused by accident [4] and arising out of the ownership, maintenance or use of a motor vehicle covered by said policy, including the endorsements thereon, and by the terms of said policy and its endorsements, this defendant further agreed and provided that upon its failure to pay any such final judgment, the judgment creditor could maintain an action in any court of competent jurisdiction to compel such payment. Said policy by its protective provisions, covered the motor vehicle through the use and operation of which said minor was injured.

VI.

The defendant has in its possession a duplicate of said policy and all endorsements thereon, and for that reason the same is not copied into or attached to this complaint.

VII.

That said final judgment against David Bunney and Clarence Bunney, doing business as Bunney Brothers, is a judgment for damages including care because of bodily injury sustained by said minor child, caused by accident and arising out of the ownership, maintenance or use of an automobile truck upon which this defendant then had in force its policy of liability insurance, the limits of liability on which exceeded the amount of the total judgment so entered in favor of said minor child.

Wherefore, Plaintiff prays judgment against said defendant in the sum of \$3817.20, together with interest thereon from December 13, 1940, and that he have and recover his costs and disbursements herein, and such other, further and different relief as is deemed just and equitable in the premises.

WELTS & WELTS

HENDERSON & McBEE

Attorneys for Plaintiffs.

State of Washington,
County of Skagit—ss.

Laurence P. Bunney, being first duly sworn, on oath deposes and says: That he is the plaintiff named herein; that he has read the foregoing Complaint, knows the contents thereof, and that the [5] statements contained therein are true and correct.

LAURENCE P. BUNNEY

Subscribed and sworn to before me this 14th day of February, 1942.

R. V. WELTS

Notary Public in and for the
State of Washington, re-
siding at Mount Vernon.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [6]

[Title of Superior Court and Cause.]

NOTICE OF INTENTION TO FILE
PETITION FOR REMOVAL

To: Laurence P. Bunney, as guardian of Wilmer Bunney, a minor, Plaintiff, and to Henderson & McBee and Welts & Welts, his attorneys:

Notice Is Hereby Given that the defendant named in the above entitled action, to-wit, Associated Indemnity Corporation, a corporation, will on the 6th day of April, 1942, file in the Superior Court of the State of Washington in and for Skagit County, in which Court the above entitled action is now pending, its Petition and Bond for removal of said action from the said State Court to the District Court of the United States for the Western District of Washington, Northern Division.

Said Petition and Bond for removal will be presented to the Judge of the above named Court at the hour of 10:30 a.m. on said date, together with proposed Order for transfer and removal of said cause to the said District Court of the United States for the Western District of Washington, Northern Division, for the signature of said Judge; a copy of said proposed order being herewith served upon you, together with copies of said Petition and Bond for Removal.

N. A. PEARSON

Attorney for Defendant.

Copy Recd. 4/2/42.

WELTS & WELTS

Attorneys for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk. By Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy. [7]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO
UNITED STATES DISTRICT COURT.

To the Honorable Judge of the Superior Court of
the State of Washington, For Skagit County,
Sitting at Mt. Vernon:

Comes now the defendants above named, Associated Indemnity Corporation, a corporation, and files its petition for the removal of the above entitled action from the Superior Court of the State of Washington in and for Skagit County, in which it is now pending, to the District Court of the United States for the Western District of Washington, Northern Division, held in the City of Bellingham in said District, and your Petitioner respectfully shows the Court:

I.

That the above entitled action was commenced in the said Superior Court of the State of Washington in and for Skagit County by mailing a copy of Summons and Complaint to the Home Office of defendant in San Francisco, State of California.

II.

That the above entitled action is one of a civil nature of which the District Courts of the United States have original jurisdiction, and is an action brought by the plaintiff to recover damages for personal injuries received by plaintiff Wilmer Bunney of the age of 14 years. That plaintiff has a judgment for damages against certain defendants because of bodily injury sustained by said minor child and alleges that the accident causing said injuries arose out of the ownership, maintenance and use of an automobile truck upon which it is alleged that this defendant then had in force its policy of liability insurance. [8]

III.

That the value of the matter in said action exceeds the sum of Three Thousand Dollars (\$3000.00) exclusive of interest and costs. Damages sought in said action are in the amount of Three Thousand Eight Hundred Seventeen and 20/100 Dollars (\$3817.20) together with interest from December 13, 1940, together with costs and disbursements.

IV.

That at the time of the commencement of this

action and prior to that time, and at all times subsequent thereto, the plaintiff was and now is a citizen and resident of the State of Washington. That the defendant in this action, seeking this removal, at the time of the commencement of this action and prior thereto, and at all times subsequent thereto was a resident of the State of California and a corporation organized under the laws of the State of California with offices in San Francisco, California.

V.

That the petitioner, Associated Indemnity Corporation, a corporation, the defendant in the above entitled action, desires to remove said action into the District Court of the United States for the Western District of Washington, Northern Division, and it presents and files herewith a good and sufficient bond, as provided by statute, conditioned as the law directs upon its entering the District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the date of filing of this Petition, a certified copy of the record of this action, and for the payment by it of all costs which may be awarded by the said District Court against said Petitioner in the event said District Court should determine this action was improperly and wrongfully removed thereto.

Wherefore your Petitioner prays that said bond and surety be accepted, that this Petition for Re-

moval be granted, and that this Honorable Court proceed no further herein, except to accept and approve said bond, direct the Clerk of this Court to prepare certified transcript [9] of the record herein, and order the removal of said action to the District Court of the United States for the Western District of Washington, Northern Division.

N. A. PEARSON,
Attorney for Defendant and
Petitioner for Removal.
Office and P. O. Address:
413-15 Arctic Building
Seattle, Washington.
Seneca 4351.

Copy Recd. 4/2/42

WELTS & WELTS
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah—ss.

Philip S. Carrell, being first duly sworn on oath, deposes and says: That he is the resident vice-president of the petitioner for the removal of the above cause to the District Court of the United States as prayed for in said petition; that the allegations of said petition are true to his own knowledge, except such as are therein stated on information and belief and as to such matters he believes them to be true.

PHILIP S. CARRELL

Subscribed and sworn to before me this 1st day of April, 1942.

[Seal] JOHN B. ALEXANDER

Notary Public in and for the State of Oregon, residing at Portland.

My commission expires April 15, 1945.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [10]

[Title of Superior Court and Cause.]

ORDER OF REMOVAL

The Petition of the above named defendant, Associated Indemnity Corporation, a corporation, filed herein, praying for removal of the above entitled action from this Superior Court of the State of Washington in and for Skagit County, to the District Court of the United States for the Western District of Washington, Northern Division, being this date presented to this Court to be heard, the said defendant appearing by its attorney of record, N. A. Pearson, and the Court having considered said petition for removal and the bond for removal filed therewith, and being fully advised, and it appearing that this is an action of a civil nature of

which the District Courts of the United States have original jurisdiction; that the value of the matters in controversy, exclusive of interests and costs, is in excess of Three Thousand Dollars (\$3000.00); that this action is a controversy wholly between citizens and residents of different states; that said action is pending undetermined in this court, and that the time limited by law or by rule of this court for the defendant to appear in and answer or otherwise plead to the Complaint therein has not yet expired; that no application has previously been made to any court or judge for removal of said action; it further appearing that said defendant has presented with said Petition and filed in this Court and cause a bond as provided by law, conditioned to pay all costs which may be awarded against it by the District Court of the United States to which removal is sought, and the Court finding that said bond and the surety thereon [11] are sufficient, and that a removal of said cause to the District Court of the United States is authorized and proper; now therefore

It Is Ordered, Adjudged and Decreed:

(1) That the said bond for removal and the surety thereon be and the same is hereby accepted and approved.

(2) That the above entitled cause be and it hereby is ordered transferred and removed to the District Court of the United States for the Western District of Washington, Northern Division, and the Clerk of this Court is hereby directed to prepare forthwith a complete copy of the record of this

Court in the above entitled action, and certify the same as a true copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Bellingham, Whatcom County, Washington, within thirty days from filing of the Petition herein.

(3) That thereafter no further proceedings be had in this Court and cause unless and until remanded here by the said District Court of the United States.

Done in open court this 6th day of April, 1942.

W. L. BRICKEY,

Judge

Presented by:

N. A. PEARSON

Counsel for Defendant.

Copy received 4/2/42

WELTS & WELTS,

Attorneys for Plaintiff.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, By M. R. Rogers, Deputy. [12]

[Title of Superior Court and Cause.]

REMOVAL BOND

Know All Men by These Presents, that we, Associated Indemnity Corporation, a corporation organized under the laws of California, as Principals, and National Surety Corporation, a New York corporation, having an office and place of business in the Colman Building, in the City of Seattle, and State of Washington, as Surety, are held and firmly bound to Laurence P. Bunney, as guardian of Wilmer Bunney, a minor, in the sum of Five Hundred (\$500.00) Dollars, for payment whereof, well and truly to be made unto the said Laurence P. Bunney, his heirs, representatives, successors and assigns, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

Upon These Conditions, the said Associated Indemnity Corporation, a corporation, being about to petition the Superior Court of the State of Washington held in and for the County of Skagit for the removal of a certain cause therein pending, wherein the said Laurence P. Bunney is plaintiff, and the said Associated Indemnity Corporation, a corporation, are defendants, to the District Court of the United States, for the Western District of Washington, Northern Division.

Now, if the said Associated Indemnity Corporation, a corporation, shall enter into said District Court of the United States, within thirty (30) days

from the date of the filing of said petition for removal a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, we have hereunto set our hands and seals this 31st day of March, A.D. 1942.

ASSOCIATED INDEMNITY
CORPORATION, a corpora-
tion.

By N. A. PEARSON

Their Attorney

NATIONAL SURETY COR-
PORATION, a corporation,

By J. H. LOBDELL

Attorney-in-fact.

Copy Recd. 4/2/42

[Seal]

WELTS & WELTS

Attorneys for Plaintiff

Seal of the National Surety Corporation.

[Endorsed]: Skagit County, Wash. Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, By M. R. Rogers, Deputy. [13]

[Title of Superior Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF
RECORD ON REMOVAL

To the Clerk of the Superior Court of Skagit
County:

Please prepare transcript on removal of all pleadings in the above entitled action and certify same as true copy of the record in said action, for removal to the United States District Court for the Western District of Washington, Northern Division, in accordance with Order of Removal entered herein.

N. A. PEARSON

Attorney for Defendant.

Office and P. O. Address:

413-15 Arctic Building

Seattle, Washington

Seneca 4351

[Endorsed]: Skagit County, Wash., Filed Apr. 6, 1942. Arthur Eliason, County Clerk, by Will B. Ellis, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk, by M. R. Rogers, Deputy. [14]

[Title of Superior Court and Cause.]

CERTIFICATE

State of Washington,
County of Skagit—ss.

I, Arthur Eliason, County Clerk of Skagit County and ex-officio Clerk of the Superior Court of the State of Washington in and for Skagit County, do hereby certify that the foregoing is a full, true and correct transcript of the entire and complete record and files, including full, true and correct copies of all minute and journal entries that are not substantially embodied in said files, in cause No. 17018 entitled Laurence P. Bunney as guardian of Wilmer Bunney, a minor, Plaintiff vs. Associated Indemnity Corporation, a corporation, Defendant, as the same now appears on file and of record in said cause in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 14th day of April, 1942.

[Seal]

ARTHUR ELIASON,

County Clerk,

By WILL B. ELLIS,

Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. April 16, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.

[Endorsed]: Filed April 16, 1942. [15]

In the District Court of the United States, Western
District of Washington, Northern Division

No. 16

LAURENCE P. BUNNEY, as guardian of WIL-
MER BUNNEY, a minor,

Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION,
a Corporation,

Defendant.

ANSWER AND AFFIRMATIVE DEFENSE

Comes now the Associated Indemnity Corpora-
tion, a corporation, defendant above named, and in
answer to the complaint of the plaintiff admits,
alleges and denies as follows:

I.

In answer to paragraph 1, admits the same.

II.

In answer to paragraph 2, admits that said suit
was brought against said defendants for personal
injuries suffered by said minor. Admits that said
suit was for hospitalization and services of physi-
cians. Admits that on said date judgment was
entered in favor of the plaintiff against said de-
fendants in said sum. Admits that this defendant
has refused to pay said judgment, and denies each
and every other matter and thing alleged therein.

III.

In answer to paragraph 3, admits that said plaintiffs Bunney did not appeal from said judgment. Admits that the other defendant appealed. Admits that said judgment was reversed, and denies each and every other matter and thing alleged therein.

IV.

In answer to paragraph 4, admits the same.

V.

In answer to paragraph 5, admits that prior to the accident up to the day before the accident, to-wit, January 4th, 1940, said [16] accident occurring on January 5th, 1940, said plaintiffs Bunney Brothers owned motor trucks. Admits that they had a permit issued by the Department of Public Service, known as the Department of Public Works. Admits that for premium paid to it defendant Associated Indemnity Corporation up to January 4th, 1940, had issued and delivered to the plaintiffs Bunney Brothers a policy of liability insurance executed by the defendant containing certain provisions and agreements that under certain conditions the vehicle covered thereby would be protected by liability insurance under the terms of said policy, and deny each and every other matter and thing alleged therein.

VI.

In answer to paragraph 6, admits the same.

VII.

In answer to paragraph 7, deny the same and each and every part thereof.

For a First Separate and Affirmative Defense defendant alleges:

I.

That at all times herein mentioned defendant, Associated Indemnity Corporation was an insurance corporation authorized to do business in the State of Washington, and has paid all fees due the State of Washington.

II.

That on the 14th day of December, 1939, it issued its Policy No. AF-253987 covering a 1935 Ford Dump Truck, Motor No. BB18-1304989, from December 14th, 1939 to December 14th, 1940, for public liability with policy limits of \$5000.00 for one person injured and \$10,000.00 for more than one person injured. That David Bunney and Clarence Bunney, doing business as Bunney Brothers, were the assured under said policy. That a copy of said policy and endorsements is in the possession of the plaintiffs. [17]

III.

That said 1935 truck was on the 4th day of January, 1940, sold, exchanged and transferred to the Pound Motor Company, a corporation, and on said date a 1938 Ford Truck was purchased by said Bunney Brothers to use in place of said 1935 Ford

Truck and said 1938 Ford Truck was delivered to said Bunney Brothers on January 4th, 1940, the day before the accident in question occurred. All interest of said Bunney Brothers in said 1935 Ford Truck was transferred to said Pound Motor Company on said 4th day of January, 1940, and actual possession of said 1938 Ford Truck was taken on said January 4th, 1940. That all right, title and interest of said Bunney Brothers in said 1935 Ford Truck ceased on January 4th, 1940, when title thereto passed to the said Pound Motor Company.

That David Bunney desired to retain the steel body which was on said truck and it was agreed between the Pound Motor Company and Bunney Brothers that he retain said steel body replacing it with a wooden body which was on another truck owned by said Bunney Brothers.

That in attempting to move the 1935 Truck on said January 5th, 1940, from its position in front of Clarence Bunney's home it was found that it was impossible to move said truck because the wheels were mired in the mud and the engine would not function properly. It was thought that there was some defect in the fuel pump of said 1935 Truck which interfered with the proper functioning of its carburetor.

David Bunney procured a can of gasoline and at the same time employed his nephew, Wilmer Bunney, a minor, 13 years of age, and son of Clarence Bunney to assist in the operation and Wilmer Bunney was instructed to pour the gasoline from

the can into the carburetor of the 1935 Truck. In doing this he climbed upon the truck and was seated upon the fender and as he started to pour the gasoline into the carburetor Daniel Bunney, another brother who was seated at the wheel of the truck, attempted to start the motor. The motor back fired and ignited the gasoline as a result of which Wilmer Bunney received the [18] *the* burns for which the action was brought, all of said matters occurring on the 5th day of January, 1940.

IV.

That said policy of liability insurance covers the general liability of David Bunney and Clarence Bunney, doing business as Bunney Brothers, and does not insure the several liabilities of said two named persons. That if at said time said Wilmer Bunney was injured through the negligence of any one it was the individual negligence of David Bunney who had charge of the operations at the time. That Clarence Bunney was not present, nor involved, nor had any interest in the matter and said injury is therefore outside the terms of the said policy.

That under Exclusions of said policy on Page 3 thereof, paragraph 5, "This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any Insured, other than domestic employment, or in the operation, maintenance, or repair

of the Automobile; or to any obligation for which any Insured may be held liable under any workmen's compensation law." That at said time said Wilmer Bunney was an employee of said insured and therefore said policy does not cover any injuries he may have received.

V.

That said policy at said time had attached to it an endorsement known as "Passenger Hazard Exclusion Endorsement" as follows: "It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or alighting from the automobile." That at said time said Wilmer Bunney was entering upon, riding in or upon said automobile at the time of said accident and therefore the policy did not cover him at the time of said injury. [19]

VI.

That the policy provides as follows: "9. Notice of Accident-Claim or Suit. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the

Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative." That said accident occurred on January 5th, 1940, and was never reported to the company or any of its representatives or agents until February 1st, 1940. That there was no reason why notice of the accident should not have been given immediately to the company, its agents or representatives; that the failure so to do voided said policy as regards that particular accident. That by reason of the failure to promptly notify defendant company, the defendant was greatly prejudiced thereby and while it did thereafter investigate said accident it did so only upon a full reservation of all its rights under said policy.

VII.

That paragraph V on page two of said policy provides as follows: "Automatic Insurance for Newly Acquired Automobiles. If the named Insured who is the owner of the Automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent [20] applicable to all such previously

owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; * * *. That said policy also contains the following under "Exclusions" page 3: "This Policy does not Apply: 2 * * * or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the Automobile, without the written consent of the company." That defendant corporation gave no such written consent.

That the entire interest of the insured in said 1935 Truck was transferred to the Pound Motor Company on January 4th, 1940, and that on January 4th, 1940, the insured purchased a 1938 Ford Truck from said Pound Motor Company trading said 1935 Ford Truck in as part of the purchase price and paying the balance due on said 1938 Ford Truck in cash, and that on January 4th, 1940, the insured took delivery and actual physical possession of the new 1938 Ford Truck which was purchased to replace the 1935 Ford Truck. That by reason of the matters herein alleged said insurance had automatically terminated upon said 1935 Truck and automatically covered the 1938 Ford Truck upon

the taking possession of said 1938 Ford Truck and therefore the policy did not cover after January 4th, 1940, said 1935 Ford Truck.

VIII.

That said policy provides as follows, page three thereof: "This Policy does not Apply: 4 under Coverages A, B, C and C-1, nor under Insuring Agreement II, while the Automobile is operated by any person under the age of 14 years * * *." That said Wilmer Bunney was assisting in the operation of said automobile truck [21] and he was at that time of the age of 13 years and therefore said accident was not covered by the terms of said policy.

IX.

That by reason of the matter and things herein alleged defendant Associated Indemnity Corporation did not cover said 1935 Ford Truck with liability insurance at the time of said accident and is not liable for any injury or damage plaintiff may have sustained on or about said 1935 Ford Truck upon said date.

Wherefore defendant prays that said action be dismissed and for its costs and disbursements herein.

N. A. PEARSON

Attorney for Defendant.

Office and P. O. Address:

413 Arctic Building
Seattle, Washington.

State of Oregon,
County of Multnomah—ss.

Philip S. Carrell, being first duly sworn on oath, deposes and says: That he is the resident vice-president of the Associated Indemnity Corporation, a corporation, defendant in the above entitled action; that he has read the above and foregoing Answer and Affirmative Defense, knows the contents thereof and the same is true as he verily believes.

[Seal] PHILIP S. CARRELL

Subscribed and sworn to before me this 7th day of May, 1942.

JENNIE BENEFIEL,
Notary Public in and for the State of Oregon, residing at Portland.

My Com. Exp. Mar. 16, 1945.

(Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 9, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.)

[Endorsed]: Filed May 9, 1942. [22]

[Title of District Court and Cause.]

REPLY

Replying to the first separate and affirmative defense set forth in defendant's answer, the plaintiff alleges:

I.

He admits that Associated Indemnity Corporation issued a policy of liability insurance with policy limits of \$5,000.00 for one person injured and \$10,000.00 for more than one person injured. That David Bunney and Clarence Bunney, and each of them, were the assured; and deny each and every other matter and thing alleged therein, and allege that said company was fully informed and cognizant of the uses made by said parties of their motor vehicles covered by said liability insurance policy and the method of use each made of said vehicles, and included in the coverage of said policy was a 1935 Ford dump truck mentioned in pleadings of said parties.

II.

Replying to Paragraph III, the plaintiff admits that on January 4, 1940, negotiations were entered into for the sale of said truck to Pound Motor Company, a corporation; admit that David Bunney, on behalf of himself and Clarence Bunney, doing business as Bunney Brothers, took delivery of a 1938 Ford truck from Pound Motor Company on January 4, 1940; admit that in said negotiations said David Bunney desired to retain the steel body which was on the 1935 truck, and it was agreed that he should do so; admit that a wooden body which was on another truck, under these negotiations was to be placed on the 1935 [23] truck before delivery thereof to Pound Motor Company; admit that in attempting to move the 1935 truck on January 5,

1940, to place it in a condition for delivery to Pound Motor Company, the wheels thereof became mired in the mud; admit that David Bunney procured a can of gasoline and gave it to Wilmer Bunney, a minor, son of Clarence Bunney, and instructed him to pour the gasoline from the can into the carburetor of the 1935 truck; admit that he started to pour the gasoline into the carburetor; admit that an attempt was made to start the motor of said truck; admit that the motor backfired, the gasoline ignited and that Wilmer Bunney received injuries for which action was brought and judgment was entered; deny each and every other allegation contained in said paragraph, and allege that the sale of said 1935 Ford truck to Pound Motor Company had not been completed; that no delivery of the property under said sales negotiations had been made to Pound Motor Company but that the work of delivery was in process when the accident occurred, and allege that the 1938 truck, delivery of which was taken on January 4th from Pound Motor Company was hooked onto and attached to the 1935 truck, furnishing pulling power therefor, and assisting in starting the motor of the 1935 truck through pulling thereon, when said injury to said child occurred through the backfiring of the motor of said 1935 truck.

III.

Replying to paragraph IV, the plaintiff denies that the policy of liability insurance failed to cover the business and transaction in which David Bunney was then engaged, and alleges that it did so

cover said transaction, and denies that Wilmer Bunney was an employee of said insured at the time of said injury to him, and denies each and every other allegation contained in said paragraph.

IV.

Replying to Paragraph V, the plaintiff denies that Wilmer Bunney at the time of his injury was entering upon or riding *it* or upon said automobile truck within the meaning of the passenger hazard exclusion endorsement mentioned in said Paragraph V if said exclusion endorsement existed, and denies each and every other allegation contained in said paragraph. [24]

V.

Replying to Paragraph VI, the plaintiff admits that the accident occurred on January 5, 1940; has not information sufficient to form a belief as to the other matters, facts and things therein set forth, and denies the same and each and every allegation therein contained, and alleges that if no report was made until February 1, 1940, the defendant was in no manner prejudiced thereby; that defendant immediately entered upon a full and complete investigation; that all information, data and facts pertaining to the subject matter existing on January 5th were similarly existing on February 1st; all witnesses to the occurrence were available to and interviewed by the defendants, and full and complete information had from them on or about February 1, 1940. That said defendant

was assisted in said investigation by counsel for said minor child although his interests were adverse to the interests of the defendant and defendant was permitted to interview and take statements from all witnesses adverse to defendant as well as favorable to defendant, and did so; and was assisted in obtaining full knowledge of all facts whatsoever pertaining to said occurrence, and did so; and defendants were in no manner prejudiced and waived any claim of lack of timeliness of notice of the occurrence if notice was not given.

VI.

Replying to Paragraph VII, the plaintiff denies that the coverage of said liability policy as applied to the 1935 truck automatically terminated; he does not know whether the coverage also became applicable to and applied to the 1938 Ford truck which was delivered by Pound Motor Company, but alleges that both trucks were covered by the provisions of said policy at the time the occurrence happened, all as provided in said policy and the riders attached thereto and a part thereof, and both trucks participated in the occurrence, and denies each and every other allegation contained in said paragraph. [25]

VII.

Replying to Paragraph VIII, plaintiff denies the same and each and every allegation therein contained.

Wherefore, plaintiff prays judgment against the

defendant in accordance with the demands of his complaint.

WELTS & WELTS

HENDERSON & McBEE

Attorneys for Plaintiff

State of Washington

County of Skagit—ss.

Laurence P. Bunney, being first duly sworn, on oath deposes and says: That he is the plaintiff named herein; that he has read the foregoing Reply, knows the contents thereof and that the statements therein contained are true and correct.

LAURENCE P. BUNNEY

Subscribed and sworn to before me this 23rd day of May, 1942.

[Seal]

R. V. WELTS

Notary Public in and for the State of Washington,
residing at Mt. Vernon.

(Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, May 28, 1942. Judson W. Shorett, Clerk. By M. R. Rogers, Deputy.)

[Endorsed]: Filed May 28, 1942. [26]

[Title of District Court and Cause.]

COURT'S CERTIFICATION OF STATEMENT
OF FACTS ON PRE-TRIAL HEARING

This cause coming on for pre-trial hearing under Rule 16 of the Rules of Civil Procedure, plaintiff

appearing by Messrs. Welts & Welts, and Messrs. Henderson & McBee, and defendant appearing by Mr. N. A. Pearson, and the hearing on pre-trial having been had, the following facts were found and certified by the Court:

On January 4, 1940, the Registration certificate for the truck on which the accident happened was delivered to Pound Motor Company, and Bunney, the owner of the old truck on which the accident happened stated that he desired to take the steel body off his old truck and put it on the new truck and put on the old truck the wooden body which was to be a part of the equipment bought by Pound.

When the certificate of title was delivered Bunney said: "When I come to take delivery on the 1938 truck I asked him if I could have the 1935 truck a few days, that I was going to be rather busy. 'Yes,' he said, 'but will you change the bodies and bring it down as soon as you can.' I said I would."

It is agreed that the statement of facts in Cause No. 16431 in the Superior Court of Skagit County, entitled Arthur Miles as Guardian ad litem for Wilmer Bunney, a minor, and individually, Plaintiff, vs. David Bunney and Clarence Bunney, etc., et al, Defendants, is a correct transcript of the testimony in that case and may be used on the trial of this case for reference purposes without calling the official court reporter who transcribed the same. [27]

It is agreed that the following defendant's exhibits may be considered without any further proof and are only open to objection on the question of materiality on the trial, to-wit:

A-1, Automobile Purchase Order

A-2, Receipt

A-3, Chattel Mortgage

same being photostatic copies of originals.

The following Plaintiff's exhibits are admitted in evidence as follows:

1. Copy of insurance policy issued to David Bunney and Clarence Bunney by the defendant Associated Indemnity Corporation on December 14, 1939 and expiring December 14, 1940, being insurance policy No. 253987 together with all endorsements placed thereon by the defendant and being the policy and endorsements in this law suit. Also the certified copy of the permit issued by the Department of Public Service of the State of Washington to David and Clarence Bunney dated October 16, 1939 and in effect until the time subsequent to the injury herein in question under which David Bunney was operating his vehicle.

Attorneys for the defense do not admit that the permit was in effect at the time of the injury.

2. Certified copy of Rules 30, 31, 33, 34 and General Order No. 68 of the Department of Public Service of the State of Washington, which were in effect on January 5, 1940, and marked Exhibits No. 2.

3. Certified copy of the Judgment rendered in Cause No. 16431 of the Superior Court of Skagit County. Said judgment is unpaid and unsatisfied. Marked Exhibit No. 3.

It is admitted that the plaintiff is the general guardian of the infant and owns the judgment.

It is admitted that the Insurance Company is authorized to do business in the State of Washington and is duly licensed, and has paid all fees due the State of Washington. [28]

It is agreed that the Judgment (Plaintiff's Exhibit 3) was entered for personal injury and necessary and required hospitalization and medical care caused by accident arising from use of the truck named in defendant's policy, being the 1935 truck.

It is agreed that on the 5th day of January, 1940, pursuant to notice from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.

After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the

1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks. Thereupon he called to the child Wilmer Bunney who was playing basket ball and told him to come and pour a can of gasoline into the carburetor of the 1935 truck. After the second call the child came, David Bunney giving him a tomatoe can full of gasoline, removed the flame arrestor from the carburetor of the truck, and the child started to pour the gasoline into the carburetor of the 1935 truck. David Bunney got into the 1938 truck which was physically connected to the 1935 truck and pulled on the 1935 truck. The brother Daniel Bunney was sitting in the 1935 truck at the steering wheel to guide it. It is in dispute between the parties whether the back firing of the motor of the 1935 truck was produced by Daniel Bunney attempting to start the motor with the starter of that truck, or whether it was started by the action of [29] David Bunney in pulling on the 1935 truck with the 1938 truck.

The defendant has no testimony to offer that it was prejudiced by reason of the failure to give notice of the accident at the time it occurred instead of February 1, 1940. The plaintiff will offer affirmative testimony that the defendant was not and could not be prejudiced by failure to give such notice for the following reasons:

First, the only persons present when the accident occurred were the mother of the child, the

child, Daniel Bunney and David Bunney. Immediately following notification to the insurance company its representative came to Mt. Vernon and contacted Mr. R. V. Welts who took the representative to the Clarence Bunney home and saw that he met Mrs. Bunney, the child's mother and interviewed her in Mr. Welt's presence, and was authorized by Mr. Welts to interview her if he wished in his absence, and took a complete statement of all facts which she knew. He was also put in touch with the Brother Daniel Bunney, and his own policy holder David Bunney, interviewed them and each of them and took statements from them pertaining to the accident. That all of these parties continued to reside in Mt. Vernon for a period of time after they were interviewed by the insurance company, and thereafter the child and his parents moved to Everett where they have been and are now located. The operators of the Pound Motor Company who had anything to do with the truck transaction here in question were G. A. Pound and Orville Pound and none other. They remained in Mt. Vernon and were interviewed by the insurance company. G. A. Pound is still there and the son Orville is at Fort Lewis having been in the armed services now for only a few months. No facts known by counsel were withheld from the insurance company. As much was learned as could have been learned at any other time prior to the investigation. The defendant has no refuting evidence to offer.

The only open issue upon the facts is the ownership of [30] the 1935 truck at the time of the accident and whether the child was standing on the ground or whether he was sitting on the fender of the truck at the time the gasoline was poured into the carburetor, and what Daniel Bunney and David Bunney were doing at the time of the accident with relation to starting the 1935 truck and the pulling by the 1938 truck, and Daniel Bunney stepping on the starter of the 1935 truck.

Dated this 6th day of October, 1942.

JEREMIAH NETERER

U. S. District Judge

Approved:

Attorney for plaintiff

Attorney for defendant

[Endorsed]: Filed Oct. 6, 1942. [31]

[Title of District Court and Cause.]

DEFENDANT'S REQUESTED
INSTRUCTIONS

[32]

No.

You are instructed that the policy of liability insurance issued by the defendant company covered the general liability of David Bunney and Clarence Bunney, doing business as Bunney Brothers, and did not insure the individual and several liabil-

ities of said brothers, and if you find that at the time said Wilmer Bunney was injured that it was the individual liability and business of David Bunney and that he had charge of the operations at that time and you find that said Clarence Bunney had no interest in said truck or matter and that said transferring of said body was not part of the business of Bunney Brothers, as a partnership, then I charge you that said insurance policy did not apply at the time of said accident. [33]

No.

The Court instructs the jury that you are to find for the defendant. [34]

No.

You are instructed that if you find from the evidence in this case that the 1935 Ford Truck which was covered by the defendant's insurance policy was sold and the title thereto transferred to Pound Motor Company on the 4th day of January, 1940, the day before the accident occurred, then I charge you that the insurance policy no longer applied to the 1935 Ford Truck and your verdict must be for the defendant. [35]

No.

You are instructed that the mere fact that David Bunney desired to transfer the body from the 1935 Ford Truck is no indication, and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you

find that he sold and delivered title of said truck to other parties on January 4th, 1940. [36]

No.

If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant. [37]

No.

If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word "riding" does not necessarily mean that the truck would have to be in motion the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding. [38]

No.

You are instructed that if you find from the evidence in this case that Bunney Brothers did not give prompt notice to the insurance company of the accident as soon as practicable then I charge you there would be no recovery in this case if you find that by reason of said delayed notice the insurance company was prejudiced in any way of said delayed notice. [39]

No.

You are instructed that if you find from the evidence in this case that the 1935 Truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford Truck trading said 1935 Ford Truck to said Pound Motor Company as part of the purchase price and paying the balance due on said 1938 Ford Truck in cash and that on said date, to-wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said insurance written by defendant on said 1935 Truck automatically terminated upon said 1935 Truck and automatically covered the 1938 Ford Truck upon the taking possession of the said 1938 Ford Truck and that the policy did not cover the said 1935 Ford Truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant. [40]

No.

You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of 14 years and if you find that said Wilmer Bunney was under the age of 14 years and was assisting in the operation of said truck at the time of the accident then I charge you that

said insurance policy did not apply at the time of said accident and your verdict must be for the defendant.

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 7, 1942. [41]

PLAINTIFF'S EXHIBIT No. 1

S. F. No. 1052-1939-42C. 17491. Duplicate.
Permit No. CC 7034

PERMIT

State of Washington
Department of Public Service.

PERMIT FOR THE OPERATION OF MOTOR
PROPELLED VEHICLES

Order No. M. V. 32122
P-9797

This is to certify: That

| | |
|--------------------------|---------|
| Bunney, David & Clarence | CC-7034 |
| Bunney Bros. | |
| 124 11th Street S. | D-1 |
| Mt. Vernon, Wash. | |

is authorized to operate motor vehicles as a Common Carrier in the transportation of commodities and in the territory described herein. This permit is issued pursuant to the provisions of Chapter 184,

Plaintiff's Exhibit No. 1—(Continued)

Laws of 1935, and acts amendatory thereof and supplemental thereto.

Intrastate, irregular route, non-radial service as a carrier engaged in Dump Truck operations, in King, Snohomish and Skagit Counties.

L-D-7-M.V. 32122-10-16-39

(Extension Granted)

(M.V. No. 32915)

(Feb 23 1940)

This permit does not authorize any interstate operations over the highways of the State of Washington except to the extent permitted by the Constitution and laws of the United States. [42]

Dated at Olympia, Washington, October 16, 1939.

DIRECTOR OF PUBLIC
SERVICE

By CHARLES H. KENT

Superintendent of Transportation

The Commodities that you haul and the territory that you cover are governed exclusively by the information shown hereon.

ap [43]

ASSOCIATED INDEMNITY CORPORATION

110.—Truckmen—Hauling Under Contract

The named Insured having declared, as evidenced by the acceptance of this endorsement, that all of

Plaintiff's Exhibit No. 1—(Continued)

the commercial automobiles which he owns will be used during the policy period exclusively for commercial purposes in the business of Hugo Sigismund, Contractor, Everett, Wash. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy, it is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named.

This endorsement forms a part of Policy No. 253987 AF issued to David Bunney & Clarence Bunney d/b/a Bunney Bros. by the Associated Indemnity Corporation of San Francisco, California, and is effective from August 7, 1940. (12:01 A. M. Standard Time)

ASSOCIATED INDEMNITY
CORPORATION

C. W. FELLOWS

President

C. C. ANDERSON

Secretary

Countersigned at Everett, Washington.

CLARK INVESTMENT CO.

By CLARK SALISBURY

(Duly Authorized Representative)

(Received Aug. 9, 1940. Dept. Pub. Serv.) [44]

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE
COMPANY

Notice Is Hereby Given That for the remainder of the policy period the truck insured hereunder will be operated in and in the vicinity of Everett, Washington. It will not be regularly or frequently operated into a higher rated territory than Territory IV, Washington.

The additional premium for this endorsement is \$3.34. Effective: August 7, 1940. 12:01 A. M.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements, or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney d/b/a Bunney Bros. and shall become effective on the 7th day of August, 1940, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION
L. S. MOORHEAD
President
C. C. ANDERSON
Secretary

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED FIRE & MARINE
INSURANCE COMPANY

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Policy dates from December 14, 1939, to December 14, 1940. Countersigned at Everett, Washington, on August 7, 1940.

Agent

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY

(Received Aug. 9, 1940. Dept. Pub. Serv.) [45]

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE
COMPANY

It is hereby understood and agreed that the name of the assured is completed to read:

David Bunney & Clarence Bunney d/b/a Bunney Bros.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements, or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated In-

Plaintiff's Exhibit No. 1—(Continued)

demnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. AF 253987 issued to David Bunney and Clarence Bunney d/b/a Bunney Bros. and shall become effective on the 14th day of December, 1939, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

ASSOCIATED FIRE & MA-
RINE INSURANCE COM-
PANY

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Policy dates from December 14th, 1939, to December 14th, 1940. Countersigned at Everett, Washington on January 25th, 1940.

Agent

CLARK INVESTMENT CO.

Countersigned by

/s/ CLARK SALISBURY

(Received Mar. 1, 1940. Dept. Pub. Serv.) [46]

Plaintiff's Exhibit No. 1—(Continued)

Associated Indemnity Corporation

Associated Fire & Marine Insurance Company

ADDITION, SUBSTITUTION OR ELIMINATION OF AUTOMOBILE ENDORSEMENT

In consideration of the premium adjustment shown herein, it is hereby understood and agreed that the below described Policy is extended to provide insurance against direct loss or damage from such of the Coverages described in the Policy for which Additional or Return premiums or the words "No Charge" are shown in the Schedule of Coverage hereof, with respect to the automobile described in Item 1, and that the automobile described in Item 2 hereof is eliminated from coverage under the Policy. The limit of the Company's liability against each such Coverage shall be as stated herein, subject to all of the terms of the policy having reference thereto.

Item 1—(Description of Automobile Added)

Trade Name—Ford.

Year, Model—Yr. 1938, Mod.—.

No. of Cyls.—V8.

Type of Body—(If Truck, State Tonnage)—1½
T. Dump Truck.Car Numbers—(Give Both Numbers) Mtr. 18-
4295384, Ser.—.

Factory List Price—.

Actual Cost to Insured—.

Purchased—Month, Year, New or 2d Hand—.

Plaintiff's Exhibit No. 1—(Continued)

1. The named Insured is the sole owner of the Automobile, except as herein stated:—

2. The Automobile will be principally garaged and used in the Town, County and State shown in the address of the Insured in the Policy, unless otherwise specified herein—

3. The purposes for which the Automobile is to be used are Commercial only. May be used for occasional personal and family purpose.

4. Loss, if any, other than under Bodily Injury Liability and Property Damage Liability Coverages is payable to—

Item 2—(Description of Automobile Eliminated)

Year—1935

Trade Name—Ford

Type of Boy—1½ T. Dump Truck

Motor Number—BB18-1304989

Serial Number—

Plaintiff's Exhibit No. 1—(Continued)

SCHEDULE OF COVERAGE

Only those Coverages for which Additional or Return premiums or the words "No Charge" are stated below are insured against.

| Associated Indemnity Corporation | | Premiums | |
|---|---|--------------|---------|
| Coverages | Limits of Liability | Additional | Return |
| Bodily Injury Liability | \$5,000.00 each person and subject to that limit for each person \$10,000.00 each accident | \$ No Charge | \$----- |
| Property Damage Liability | \$5,000.00 each accident | \$ No Charge | \$----- |
| Collision | Actual Cash Value, \$..... deductible | \$----- | \$----- |
| Accidental Collision or Upset— "Convertible"—\$..... Additional premium for "full coverage" payable upon reporting an accidental collision | Actual cash value at time of loss | \$----- | \$----- |
| "Additional" Coverage Per Endorsement Form No..... | As stated in Endorsement No..... attached to Policy. | \$----- | \$----- |

Plaintiff's Exhibit No. 1—(Continued)

| Associated Fire & Marine Insurance Company | | | | |
|---|---|--|---------|--|
| Coverages | Limits of Liability | Premiums | | |
| | Maximum Amount | Additional | Return | |
| Fire, Lightning and Transportation | of Insurance. \$..... Rate \$..... | \$..... | \$..... | |
| Theft, Robbery or Pilferage (Broad Form) | Maximum Amount of Insurance. \$..... Rate \$..... | \$..... | \$..... | |
| Theft, Robbery or Pilferage (Deductible Pilferage Form) | Maximum Amount of Insurance. \$..... Rate \$..... | \$..... | \$..... | |
| Fire, Lightning and Transportation (Coverage I) and Theft, Robbery or Pilferage—Broad Form (Coverage II) | Actual Value | \$..... | \$..... | |
| “Additional” Coverage Per Endorsement Form No..... | As stated in Endorsement No..... attached to Policy. | \$..... | \$..... | |
| Total Net | | Premium for this Endorsement \$..... | | |
| | | (Insert “Additional” or “Return” or “No Charge”) | | |

Plaintiff's Exhibit No. 1—(Continued)

Nothing herein contained shall be held to waive, alter, vary or extend any of the agreements, stipulations, conditions or limitations of this Policy, other than as above stated. This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney, dba Bunney Bros., and shall become effective on the 8th day of January, 1940, at 12:01 A. M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

ASSOCIATED FIRE & MA-
RINE INSURANCE COM-
PANY

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Countersigned at Everett, Washington, on Jan-
uary 9, 1940.

By CLARK INVESTMENT CO.

Authorized for the purpose.

/s/ CLARK SALISBURY

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE
COMPANY

Copy

PASSENGER HAZARD EXCLUSION
ENDORSEMENT

It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or upon or alighting from the automobile.

Signed and Accepted

DAVID BUNNEY

Signed and Accepted

CLARENCE BUNNEY

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939 at

Plaintiff's Exhibit No. 1—(Continued)

12:01 A. M. Standard Time at the place of counter-signature and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

ASSOCIATED FIRE & MA-
RINE INSURANCE COM-
PANY

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Policy dates from Dec. 14, 1939 to December 14, 1940. Countersigned at Everett, Washington on Dec. 14, 1939.

Agent

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY [48]

Copy

ASSOCIATED INDEMNITY CORPORATION

110—Truckmen—Hauling Under Contract

The named Insured having declared, as evidenced by the acceptance of this endorsement, that all of the commercial automobiles which he owns will be used during the policy period exclusively for

Plaintiff's Exhibit No. 1—(Continued)

commercial purposes in the business of W. P. A. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy, it is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named.

This Endorsement forms a part of Policy No. 253987 AF issued to David and Clarence Bunney by the Associated Indemnity Corporation of San Francisco, California, and is effective from Dec. 14, 1939, 12:01 A.M. Standard Time.

ASSOCIATED INDEMNITY
CORPORATION

C. W. FELLOWS

President

C. C. ANDERSON

Secretary

Countersigned at Everett, Washington

CLARK INVESTMENT
COMPANY

By CLARK SALISBURY

(Duly Authorized Represen-
tative)

Form 110.—Uniform Standard Automobile En-
dorsement.

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSUR-
ANCE COMPANY

Copy

It is hereby understood and agreed that the truck insured hereunder will not be regularly or frequently operated into a higher rated territory than that shown in the policy.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation and Associated Fire & Marine Insurance Company, when countersigned by a duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939 at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

ASSOCIATED INDEMNITY
CORPORATION

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Plaintiff's Exhibit No. 1—(Continued)

ASSOCIATED FIRE & MARINE INSURANCE COMPANY

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Policy dates from Dec. 14, 1939 to Dec. 14, 1940.

Countersigned at Everett, Wash., on Dec. 14, 1939.

Agent

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY

Form 257-2AF 30M 6-39X [50]

Copy

ASSOCIATED INDEMNITY CORPORATION
COMPULSORY AUTOMOBILE INSURANCE
ENDORSEMENT

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability and for Property Damage Liability applies, subject to the following provisions:

1. Application of Insurance. The insurance applies to any automobile or trailer used by the named insured at any time during the policy period under the insured's certificate of public

Plaintiff's Exhibit No. 1—(Continued)

convenience and necessity or permit issued in compliance with any federal or state law, or any administrative rule adopted under such law, provided

- (a) such automobile is not owned in full or in part by, or registered in the name of the named insured or a partner thereof if the named insured is a partnership or an executive officer thereof if the named insured is a corporation;

and does not apply to the liability of the owner of any hired automobile or trailer or to the liability of any employee of such owner.

2. Premium. The advance premium for the insurance, extended by this endorsement is Bodily Injury \$.65, Property Damage \$.45.

The earned premium for the insurance is based on the application of the classifications and rates for hired automobiles and trailers stated in the Automobile Casualty Manual in use by the company on the effective date of the policy, to the amount incurred by the named insured for the hire of such automobiles and trailers. The amount incurred shall include the wages of the named insured's chauffeurs employed in operating such automobiles and trailers, provided such vehicles are hired without chauffeurs in attendance.

The advance premium shall be the minimum premium for the insurance extended by this

Plaintiff's Exhibit No. 1—(Continued)

endorsement except that if the named insured incurs any expense for the hire of automobiles or trailers during the policy period, the minimum premium shall be Bodily Injury \$15.00, Property Damage \$9.00.

3. Records. The named insured shall maintain for each location where the automobiles or trailers are used a chronological record for the policy period with respect to such vehicles hired, stating (a) number and type; (b) periods of hire; (c) amount incurred; (d) names of parties from whom such vehicles are hired. The named insured shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

4. Inspection. The company shall be permitted to examine and audit at all reasonable times during the policy period or within two years after the termination thereof the named insured's records so far as such records relate to the subject matter of this insurance. [51]

Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, stipulations, agreements or limitations of the Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation, when countersigned by its duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David

Plaintiff's Exhibit No. 1—(Continued)

Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14th day of December, 1939, at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

L. S. MOORHEAD,

President

C. C. ANDERSON,

Secretary

Countersigned at Everett, Washington, on Dec. 14th, 1939.

Agent

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY

Authorized for the purpose [52]

Copy

Associated Indemnity Corporation

DEPARTMENT OF PUBLIC SERVICE

ENDORSEMENT

Washington

The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935 of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regula-

Plaintiff's Exhibit No. 1—(Continued)

tions of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for bodily injury, including death resulting therefrom, and/or damage to property (excluding cargo) of any person or persons other than the insured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the insured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment: Provided, However, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the insured shall relieve the Company from liability hereunder or from the payment of such judgment.

Plaintiff's Exhibit No. 1—(Continued)

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

\$5,000.00 for any recovery for bodily injury to or death of one person, and subject to the same limit for one person;

\$10,000.00 for any recovery for bodily injury to or death of all persons as a result of one accident;

\$5,000.00 for damage to property, excluding cargo, of any person other than the insured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of \$5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of [53] ten days from the date of beginning of use of such equipment: Provided, However, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the

Plaintiff's Exhibit No. 1—(Continued)

limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together they shall for the purpose of this endorsement be construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of said insured engaged in the operation or maintenance of any automobile or any other employee of the insured arising out of or in the usual course of the trade, business, profession or occupation of the insured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the Company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Reimbursement Agreement. The insured agrees to reimburse the Company for any payment made by the Company on account of any accidents, claim or suit involving a breach of the terms of the policy and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Plaintiff's Exhibit No. 1—(Continued)

Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, stipulations, agreements or limitations of the Policy, other than as above stated.

This Endorsement, issued by the Associated Indemnity Corporation, when countersigned by its duly authorized official or representative, shall form a part of Policy No. 253987 AF issued to David Bunney and Clarence Bunney (Bunney Bros.) and shall become effective on the 14 day of December, 1939, at 12:01 A.M. Standard Time at the place of countersignature, and shall terminate with the Policy.

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Countersigned at Everett, Washington, on December 14, 1939.

Sub-Agent or Broker

CLARK INVESTMENT CO.

Countersigned by

CLARK SALISBURY

(Resident Licensed Agent)

Form 4417 4 Wash. 1M 9-41 X [54]

Plaintiff's Exhibit No. 1—(Continued)

Associated Indemnity Corporation
Fire & Marine Insurance Company
(Emblem)

Head Offices—San Francisco
(Each a Stock Company)

(Copy)

No. 253987 AF
Premium \$23.10

DECLARATIONS

Item 1. Name of Insured—David Bunney and Clarence Bunney. The named Insured is (Individual, Corporation or Partnership).

Item 2. Address—124 So. 11th St., Mt. Vernon, Skagit County, Wash.

Item 3. The Automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein.

Item 4. The occupation of the named Insured is Truckers, employed by W. P. A.

Item 5. Policy Period: From Dec. 14, 12:01 A. M., 1939, to December 14, 1940, 12:01 A. M., standard time at the address of the named Insured as stated herein.

Item 6. Description of the Automobile and facts relating to its purchase.

Trade Name—Ford.

Year Model—1935.

No. of Cyls.—V8.

Type of Body (If truck, state tonnage)—Truck
11½ T Dump.

Plaintiff's Exhibit No. 1—(Continued)

Car Numbers (Give both numbers)—Mtr. BB18-1304989. Sr.....

List Price—

Actual Cost to Insured—

Purchased Month, Year—; New or Used—.

Item 7. The named insured is the sole owner of the Automobile, except as herein stated: no exceptions (title to insured truck is in the name of Bunney Bros.)

Item 8. The purposes for which the Automobile is to be used are Commercial only. (Specify whether "pleasure and business" or "commercial only" as defined in paragraph (a) and/or (b) following; or describe other uses.) May also be used for occasional personal and family purposes.

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use.

(b) The term "commercial only" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named Insured's business occupation as expressed in Item 4. (c) Use of the Automobile for the purposes stated includes the loading and unloading thereof.

Item 9. No insurer has canceled any automobile insurance issued to the named Insured, nor declined to issue such insurance, during the past year, except as herein stated: no exceptions.

Item 10. Loss, if any, other than under Coverages A and B is payable to.....

Plaintiff's Exhibit No. 1—(Continued)

Item 11. The insurance afforded is only with respect to such and so many of the following Coverages as are indicated by specific premium charge or charges. The limit of the companies' liability against each such Coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto.

Plaintiff's Exhibit No. 1—(Continued)

| Company | Coverages Each as Defined on Page Two | Limits of Liability | Premiums |
|--|--|--|----------|
| Associated Indemnity Corporation | A. Bodily Injury Liability | \$ 5,000.00 each person, and, subject to that limit for each person, \$10,000.00 each accident or a series of accidents arising from one and the same cause. | \$13.00 |
| | B. Property Damage Liability | \$ 5,000.00 each accident or a series of accidents arising from one and the same cause. | \$ 9.00 |
| | C. Collision | Actual Cash Value less \$ deductible | \$ nil |
| C-1. Convertible Collision—\$..... Additional premium for full coverage payable upon report- ing an accidental collision. | | Actual Cash Value | \$ nil |
| Endorsement—State Compulsory | | Endorsement | \$ 1.10 |
| Total Premium, Associated Indemnity Corporation | | | \$23.10 |

Plaintiff's Exhibit No. 1—(Continued)

| Company | Coverages Each as Defined on Page Two | Limits of Liability | Premiums |
|--|--|---------------------|----------|
| Associated Fire & Marine Insurance Company | D. Comprehensive, including Fire and Theft | \$ | \$ nil |
| | E. Excluding Collision or Upset | | |
| | F. Fire, Lightning, and Trans- portation | \$ | \$ nil |
| | G. Theft, Robbery, and Pilferage | \$ | \$ nil |
| | Tornado, Cyclone, Windstorm, Hail, Earthquake, Explosion, and Water Damage | \$ | \$ nil |
| | Endorsement | | \$ nil |
| | Total Premium, Associated Fire & Marine Insurance Company | | \$ nil |
| | Total Premium, Both Companies | | \$23.10 |

[Overprinted] : Specimen Copy.

Plaintiff's Exhibit No. 1—(Continued)

Countersigned at Everett, Washington. Date
Dec. 14, 1939.

Renewal of Policy No.—new.

Sub Agent or Broker

CLARK INVESTMENT CO.

By CLARK SALISBURY

Authorized Representative

[55]

ASSOCIATED INDEMNITY CORPORATION
and
ASSOCIATED FIRE & MARINE INSURANCE
COMPANY OF SAN FRANCISCO,
CALIFORNIA

(Each a Stock Insurance Company,
herein called the Company)

Do Hereby Severally Agree with the Insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the Declarations and subject to the limits of liability, exclusions, conditions, and other terms of this policy, provided (1) that the Associated Indemnity Corporation shall be the insurer with respect to such of Coverages A, B, C, and C-1 for which a premium is specified and charged in Item 11 of the Declarations, and no other, and (2) that the Associated Fire & Marine Insurance Company shall be the insurer with respect to such of Coverages D, E, F and G, for which a premium is specified and charged in Item 11 of the Declarations, and no other:

Plaintiff's Exhibit No. 1—(Continued)

INSURING AGREEMENTS

I. Coverage A—Bodily Injury Liability.

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance, or use of the Automobile.

Coverage B—Property Damage Liability.

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance, or use of the Automobile.

Coverage C—Collision.

To pay for direct loss consisting of damage to or destruction of the Automobile and its equipment caused by accidental collision with another object or by upset, but only for the amount of each separate loss, when determined, in excess of the deductible sum, if any, stated in Item 11 of the Declarations.

Plaintiff's Exhibit No. 1—(Continued)

Coverage C-1—Convertible Collision.

To pay for direct loss consisting of damage to or destruction of the Automobile and its equipment caused by accidental collision with another object or by upset, it being agreed that upon the occurrence of the first accidental collision or upset which is made the basis of a claim hereunder, the Insured shall pay to the company an additional premium in the amount stated in Item 11 of the Declarations for full coverage collision insurance, and the Insured shall give immediate notice in writing to the company of said collision or upset. It is further agreed that the company shall not be liable for [56] any collision or upset occurring before the date of the accidental collision reported as aforesaid or between such date and the payment of such additional premium.

Coverage D—Comprehensive, Including Fire & Theft (Coverages E and F)—Excluding Collision or Upset.

To pay for any loss of or damage to the Automobile and the equipment usually attached thereto, excluding, however, loss or damage caused by collision with another object or by upset. Breakage of glass and loss caused directly by tornado, cyclone, windstorm, hail, falling aircraft or parts thereof, and loss resulting from theft, earthquake, explosion, riot, riot attending a strike, insurrection, or civil commotion, shall not be deemed a loss caused by collision or upset.

Plaintiff's Exhibit No. 1—(Continued)

Coverage E—Fire, Lightning and Transportation.

To insure the insured named herein against direct loss consisting of damage to or destruction of the Automobile and its equipment caused by fire arising from any cause whatsoever; lightning; or the stranding, sinking, burning, collision, or derailment of any conveyance in or upon which the Automobile is being transported on land or water, including general average and salvage charges for which the Insured is legally liable.

Coverage F—Theft, Robbery, and Pilferage—
Broad Form.

To insure the Insured named herein against direct loss consisting of the theft, robbery or pilferage of the Automobile and its equipment or damage to or destruction of such property directly resulting from such theft, robbery, or pilferage.

Coverage G—Tornado, Cyclone, Windstorm, Hail,
Earthquake, Explosion, and Water Damage.

To insure the Insured named herein against direct loss consisting of damage to or destruction of the Automobile and its equipment caused by tornado, cyclone, windstorm, hail, earthquake, explosion or accidental and external discharge or leakage of water, excluding damage caused by rain, sleet, snow, flood, rupture of tires, or explosion within the combustion chamber of an internal combustion engine.

Plaintiff's Exhibit No. 1—(Continued)

II. Defense, Supplementary Payments.

It is further agreed that as respects insurance afforded by this policy under Coverages A and B the company shall, subject to the Exclusions and Conditions applicable to such coverages

(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent;

(b) pay (1) all premiums on release of attachment and appeal bonds for an amount not in excess of the applicable limit of liability of this policy; but without any obligation to apply for or furnish such bonds; (2) all costs taxed against the Insured in any such suit; (3) all expenses incurred by the company; (4) all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon; (5) any expense incurred by the Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident. [57]

III. Investigation, Negotiation, Settlement.

The company shall have the right to make any investigation, negotiation, and settlement of any

Plaintiff's Exhibit No. 1—(Continued)

claim or suit as may be deemed expedient by the company.

In addition to the applicable limit of liability of this policy, the company agrees to pay the expenses incurred by the company under Insuring Agreements II and III.

IV. Definition of "Insured."

The unqualified word "Insured" wherever used in Coverages A and B and in other parts of this policy, when applicable to these coverages, includes not only the named Insured but also any person while using the Automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the Automobile is "pleasure and business" or "commercial only", each as defined herein, and provided further that the actual use is with the permission of the named Insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named Insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place,

Plaintiff's Exhibit No. 1—(Continued)
with respect to any accident arising out of the operation thereof;

(d) to any employee of any Insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same Insured injured in the course of such employment in an accident arising out of the maintenance or use of the Automobile in the business of such Insured.

V. Automatic Insurance for Newly Acquired Automobiles.

If the named Insured who is the owner of the Automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent

Plaintiff's Exhibit No. 1—(Continued)

applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which the named Insured has other valid and collectible insurance, nor (b) unless the named Insured notifies the company within 10 days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile. [58]

VI. Policy Period, Territory, Purpose of Use.

This policy applies only to accidents which occur and to direct losses to the property insured which are sustained during the policy period while the Automobile is within the United States in North America (exclusive of Alaska) or the dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations.

EXCLUSIONS

This Policy Does Not Apply:

1. under any of the above Coverages, nor under Insuring Agreement II, while the automobile is

Plaintiff's Exhibit No. 1—(Continued)

used in the business of demonstrating or testing, or as a public or livery conveyance, or while carrying any person for a consideration, or while rented under *under* contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor or while being operated by any person in any prearranged race or competitive speed test;

2. under any of the above Coverages nor under Insuring Agreement II, to any liability assumed by the Insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the company;

3. under Coverages A and B, nor under Insuring Agreement II, while the Automobile is being used for the towing of any trailer not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the company;

4. under Coverages A, B, C and C-1, nor under Insuring Agreement II, while the Automobile is operated by any person under the age of fourteen years; or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation;

5. under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any Insured while engaged in the busi-

Plaintiff's Exhibit No. 1—(Continued)

ness of any Insured, other than domestic employment, or in the operation, maintenance or repair of the Automobile; or to any obligation for which any Insured may be held liable under any workmen's compensation law;

6. under Coverage B, nor under Insuring Agreement II, to property owned by, rented to, leased to, in charge of, or transported by the Insured;

7. under Coverages C, C-1 and G, to loss caused directly or indirectly by fire, theft, robbery or pilferage, or consisting of injury to any tire unless caused by an accidental collision or upset of the Automobile which causes other injury to the Automobile;

8. under Coverages C, C-1, E, F and G, to loss caused directly or indirectly by invasion, insurrection, riot, war, civil war or commotion, military, naval or usurped power, or by order of any civil authority;

9. under Coverages C, C-1, D, E, F and G, to loss consisting of damage to or theft of robes, wearing apparel, or personal effects;

10. under Coverages C, C-1, D, E, F and G, except as to any lien, mortgage or other encumbrance specifically set forth and described in Item 7 of the Declarations, and unless otherwise provided by agreement in writing added hereto, if the interest of the Insured in the Automobile be or become other than unconditional and sole ownership or if the Automobile [59] has ever been stolen

Plaintiff's Exhibit No. 1—(Continued)

or unlawfully taken prior to the issuance of this policy and not returned to the lawful owner prior to the issuance of this policy, or in case of transfer or of termination of the interest of the Insured other than by death of the Insured, or in case of any change in the nature of the insurable interest of the Insured in the Automobile either by sale or otherwise, or if this policy or any part thereof or any cause of action thereunder shall be assigned before or after loss or damage;

11. under Coverage F, to loss from theft, robbery or pilferage by any person or persons of the Insured's household or in the Insured's service or employment, whether the theft, robbery or pilferage occurs during the hours of such service or employment or not; or by any person or agent thereof, or by the agent of any firm or corporation to which person, firm or corporation the Insured or any one acting under expressed or implied authority voluntarily parts with title or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense;

12. under Coverages D and F, to loss from the wrongful conversion, embezzlement or secretion by a mortgagor, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal; or to loss of tools, or repair equipment by theft, robbery, or pilferage unless the entire automobile is stolen;

Plaintiff's Exhibit No. 1—(Continued)

13. under Coverages C, C-1, D, E, F, and G, while the Automobile is being used in any illicit or prohibited trade or transportation;

14. under Coverage D, to loss caused directly or indirectly by war or civil war, invasion, military, naval or usurped power, or by order of any civil authority; or to wear and tear, mechanical or electrical breakdowns, failures, breakages or freezing;

15. under Coverages C, C-1, and D, to damage to tires, excepting where such tire damage shall be directly caused by, and result from other loss or damage covered by this policy.

CONDITIONS APPLICABLE TO
ALL COVERAGES

1. Automobile Defined. Two or More Automobiles. Except where specifically stated to the contrary, the word "Automobile" wherever used in this policy shall mean the motor vehicle, trailer, or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. Assistance and Cooperation of the Insured. The Insured shall cooperate with the company and, upon the company's request, shall attend hearings

Plaintiff's Exhibit No. 1—(Continued)

and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, in the conduct of suits, and, in the event of theft, in the recovery of the Automobile by means of replevin proceedings or otherwise; and the company shall reimburse the Insured for any expense, other than loss of earnings, incurred at the company's request. The Insured [60] shall not, except at his own cost, voluntarily make any payment, assume any obligation, or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident. Failure to cooperate in any of the foregoing respects shall render this policy null and void.

3. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the Insured's rights of recovery therefor, and the Insured shall execute all papers requested and shall do everything that may be necessary to secure such rights.

4. Changes. No notice to any agent or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President and the Secretary and countersigned by a duly authorized representative of the company.

Plaintiff's Exhibit No. 1—(Continued)

5. Assignment. No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named Insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within 30 days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Paragraph IV, and only as respects Coverages A and B, any person having proper temporary custody of the Automobile as an Insured until the appointment and qualification of such legal representative, but, in no event, for a period of more than 30 days after the date of such death or adjudication.

6. Cancellation. This policy may be cancelled by the named Insured by surrender of the policy or by mailing written notice to the company stating when thereafter such cancellation shall be effective in which case the company shall, upon demand, refund the excess of premium paid by such Insured above the customary short rate premium for the expired term. This policy may be canceled by the company by mailing written notice to the named Insured at the address shown in this policy stating when not less than 5 days thereafter such cancellation shall be effective, and, upon demand, the company shall refund the excess of premium paid by such Insured above the pro rata premium for the

Plaintiff's Exhibit No. 1—(Continued)

expired term. The mailing of notice as aforesaid shall be sufficient proof of notice, and the insurance under this policy as aforesaid shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named Insured or by the company shall be equivalent to mailing. The company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named Insured. If required by statute in the state where this policy is issued, refund of premium due to the named Insured shall be tendered with notice of cancellation when the policy is canceled by the company, and refund of premium due to the named Insured shall be made upon computation thereof when the policy is canceled by the named Insured.

7. **Declarations.** By acceptance of this policy, the named Insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing be- [61] tween himself and the company or any of its agents relating to this insurance. This entire policy shall be void in case of fraud, concealment, misrepresentation or false swearing by the Insured touching any matter relating to this insurance, or the subject thereof, whether before or after loss.

8. **Conflicting Statutory Provisions.** If any pro-

Plaintiff's Exhibit No. 1—(Continued)

vision of this policy conflicts with any law applicable hereto, such provision shall be inoperative in the jurisdiction in which it conflicts, to the extent of such conflict; and any provision required by law applicable hereto shall be deemed included herein.

APPLICABLE ONLY TO COVERAGES
A AND B

9. Notice of Accident.—Claim or Suit. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

10. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the conditions hereof nor until the amount of the Insured's obligation to pay shall have been determined either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the company, nor

Plaintiff's Exhibit No. 1—(Continued)

in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the Insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the Insured to determine the Insured's liability.

Bankruptcy or insolvency of the Insured shall not relieve the company of any of its obligations hereunder.

11. Other Insurance. If the named Insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

12. Limits of Liability.—Coverage A. The limit of bodily injury liability expressed in the Declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability ex-

Plaintiff's Exhibit No. 1—(Continued)

pressed in the Declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

13. Limits of Liability. The inclusion herein or more than one Insured shall not operate to increase the limits of the company's liability. [62]

14. Financial Responsibility Laws. Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising from the maintenance, use or operation of the Automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the company for any payment made by the company on account of any accident, claim, or suit involving a breach of the terms of this policy and for any payment the company would not have been obligated to make under the provisions of the policy except for the agreement contained in this paragraph.

Plaintiff's Exhibit No. 1—(Continued)

APPLICABLE ONLY TO COVERAGES C, C-1,
D, E, F AND G.

15. Notice of Loss. In the event of loss covered hereunder, written notice shall be given by or on behalf of the Insured to the company or any of its authorized agents, as soon as practicable, and in the event of theft, robbery, or pilferage the Insured shall also give immediate notice thereof to the police authorities.

16. Proof of Loss—Coverages D, E, F and G. Within sixty (60) days after loss, unless such time is extended in writing by the company, the Insured shall render a statement to the company signed and sworn to by the Insured stating the place, time and cause of the loss, the interest of the Insured and of all others in the Automobile, the sound value thereof and the amount of loss, all encumbrances thereon, and all other insurance, whether valid and collectible or not, covering said Automobile; and the Insured as often as required, shall exhibit to any person designated by the company all that remains of the automobile and submit to examinations under oath by any person named by the company and subscribe the same, and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by the company or its representative and shall permit extracts and copies

Plaintiff's Exhibit No. 1—(Continued)

thereof to be made. Failure to comply in any of the foregoing respects shall render this policy null and void.

17. Protection of Salvage. In the event of any loss, whether insured against hereunder or not, the Insured shall protect the Automobile from other or further loss, and any such other or further loss due directly or indirectly to the Insured's failure to so protect shall not be recoverable under this policy. Any act of the Insured or the company or its agents in recovering, saving, or preserving the Automobile shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and where the loss suffered constitutes a claim under this policy all reasonable expenses thus incurred shall also constitute a claim provided, however, that the company shall not be responsible for the payment of a reward offered for the recovery of the Automobile unless authorized by the company.

18. Limit of Liability. The company's limit of liability with respect to the Automobile and its equipment shall be the actual cash value of the property upon which loss is claimed at the time the loss occurs, or the cost of its suitable repair or replacement not in excess of such cash value, and loss shall be ascertained or estimated accordingly but shall, in no event, exceed the limit of liability, [63] if any, stated in the Declarations; such ascertainment or estimate shall be made by the Insured and

Plaintiff's Exhibit No. 1—(Continued)

the company or if they differ then by appraisal as herein provided.

19. Appraisal, Repair, Replacement, Abandonment. In case the Insured and the company shall fail to agree as to the amount of loss or damage, the company shall within thirty (3) days of the making of the proof of loss, and the Insured within sixty (60) days of such date, on the written demand of either, select a competent and disinterested appraiser. These appraisers shall first select a competent and disinterested umpire; and failing for fifteen (15) days to agree upon such umpire, then, on request of the Insured or the company, such umpire shall be selected by a judge of a court of record in the county and state in which the appraisal is pending. The appraisers shall then appraise the loss and damage, stating separately sound value and loss or damage; and failing to agree, shall submit their differences only, to the umpire. An award in writing of any two, when filed with this company, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

The Insured shall give the company reasonable opportunity to examine any property insured hereunder upon which loss is claimed before repairs are undertaken or physical evidence of loss removed.

The company shall not be held to have waived

Plaintiff's Exhibit No. 1—(Continued)

any of the terms of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination provided for herein.

The company may, at its option, either repair or replace any part or all of the insured property upon which loss is claimed with other of like kind and quality or pay to the Insured in money the full amount of such loss as determined in accordance with the provisions of this policy, subject, however, to such deduction, if any, as may be applicable thereto. There can be no abandonment to the company of any property insured hereunder.

20. Return of Stolen Property. Coverages D and F. With respect to loss under Coverages D and F the company shall have the right to return the insured property to the Insured with compensation for physical damage at any time before payment of loss.

21. Payment of Loss. Coverages D, E, F and G. Any loss or damage covered hereunder shall in no event become payable until thirty (30) days after the notice, ascertainment, estimate and verified proof of loss or damage herein required have been received by this company, and if appraisal is demanded, then not until thirty (30) days after the award of the appraisers.

22. Other Insurance. No recovery shall be had under this policy if at the time a loss occurs there be any other insurance, whether such other insur-

Plaintiff's Exhibit No. 1—(Continued)

ance be valid and collectible or not, covering such loss, which would attach if this insurance had not been effected.

23. Loss For Which Bailee For Hire Is Liable. The company is not liable for damage to any property while in the possession of a bailee for hire under a contract, stipulation or assignment purporting to make this insurance available to such bailee. Where a bailee may be liable for damage which would otherwise be covered hereunder, the company will lend the named Insured the amount of such damage. Such loan shall not affect the company's liability and shall be repaid to the extent of the amount collected, by or for the named Insured from the bailee less the expense of collection. [64]

24. Action Against Company. No action shall lie against the company for recovery under this policy unless the Insured shall have complied with all requirements hereof, nor unless commenced within twelve (12) months from the date of loss.

In Witness Whereof, Associated Indemnity Corporation has caused this policy, with respect to Coverages A, B, C and C-1 and such other parts of the policy as are applicable thereto, to be signed by its President and Secretary, but it shall not be binding until it has been countersigned by an authorized official or representative of the company.

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

Plaintiff's Exhibit No. 1—(Continued)

In Witness Whereof, Associated Fire & Marine Insurance Company has caused this policy, with respect to Coverages D, E, F and G and such other parts of the policy as are applicable thereto, to be signed by its President and Secretary, but it shall not be binding upon the company until it has been countersigned by a duly authorized official or representative of the company.

L. S. MOORHEAD

President

C. C. ANDERSON

Secretary

COMBINATION AUTOMOBILE
POLICY

253987 AF

ASSOCIATED INDEMNITY
CORPORATION

ASSOCIATED FIRE & MARINE
INSURANCE COMPANY

Head Office: San Francisco

Issued to

David Bunney and Clarence Bunney

Expires December 14, 1940.

Please Read Your Policy.

[Overprinted]: Specimen Copy.

Received Sep. 18, 1942. Dept. Pub. Serv. [65]

Plaintiff's Exhibit No. 1—(Continued)

CERTIFICATE

State of Washington,
County of Thurston—ss.

I hereby certify that the foregoing and attached documents are full true and correct copies of original Common Carrier Permit No. 7034 issued to David and Clarence Bunney, doing business as Bunney Bros., which was in full force and effect on January 5, 1940; liability and property damage insurance policy No. 253987 AF, issued by Associated Indemnity Corporation to David Bunney and Clarence Bunney, which policy was in full force and effect on January 5, 1940, covering equipment operated by David and Clarence Bunney under Common Carrier Permit No. 7034, now on file in the office of the Department of Public Service of Washington at Olympia.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Department of Public Service of Washington, this 23rd day of September, 1942.

A. E. ROTCHFORD

[Seal]

Secretary of the Department
of Public Service of Wash-
ington

S. F. No. 3271-8-4-41-1M. 23075. [66]

PLAINTIFF'S EXHIBIT No. 2

RULES AND REGULATIONS

Time Schedule No. 2

Cancels

Time Schedule No. 1

(Permit No. 88)

TIME SCHEDULE

of

WALTER A. KEYS

Operating under Trade Name of
Wenatchee-Cashmere Freight Line

MOTOR VEHICLE FREIGHT SERVICE

Between

Wenatchee, Wash. and Cashmere, Wash.

with Terminal Depots at

123 So. Wenatchee Avenue, Wenatchee;

Butler's Jewelry Store, Cashmere,

via the following route:

West on Wenatchee Avenue to city limits; thence
west on Sunset Highway through Monitor to Ter-
minal at Cashmere.

Effective June 23, 1929.

Issued June 8, 1929.

Issued to Walter A. Keys.

Title, Owner and Manager.

Street Address, 123 S. Wenatchee Ave.

City and State, Wenatchee, Wash.

Plaintiff's Exhibit No. 2—(Continued)

| • | Leave Wenatchee Read Down | | | Mileage From Wenatchee to | Daily Ex Sun | Daily Sunday only | Leave Cashmere Read Up | | |
|----|---------------------------|------|------|---------------------------|----------------|-------------------|------------------------|-------|------|
| | AM | PM | PM | | | | AM | PM | PM |
| LY | 11:00 | 1:30 | 5:30 | 0.0 | Wenatchee | Ar | 10:40 | 1:10 | 5:10 |
| " | 11:08 | 1:38 | 5:38 | 2.7 | Wen Riv Br | " | 10:32 | 1:02 | 5:02 |
| " | 11:09 | 1:39 | 5:39 | 3.3 | Olds Corner | " | 10:31 | 1:01 | 5:01 |
| " | 11:12 | 1:42 | 5:42 | 4.4 | Sunnyslope | " | 10:29 | 12:59 | 4:59 |
| " | 11:14 | 1:44 | 5:44 | 4.9 | Lovells Corner | " | 10:27 | 12:57 | 4:57 |
| " | 11:16 | 1:46 | 5:46 | 6.0 | Burkeys Corner | " | 10:22 | 12:52 | 4:52 |
| " | 11:20 | 1:50 | 5:50 | 7.0 | Crows Corner | " | 10:19 | 12:49 | 4:50 |
| " | 11:23 | 1:53 | 5:53 | 8.1 | Monitor P. O. | " | 10:16 | 12:46 | 4:46 |
| " | 11:26 | 1:56 | 5:56 | 8.7 | Blue Nose Cr | " | 10:14 | 12:44 | 4:44 |
| " | 11:29 | 1:59 | 5:59 | 9.3 | Red Bridge | " | 10:11 | 12:41 | 4:41 |
| " | 11:34 | 2:04 | 6:04 | 10.5 | Hughes Corner | " | 10:07 | 12:37 | 4:37 |
| " | 11:40 | 2:10 | 6:10 | 12.5 | Cashmere | " | 10:00 | 12:30 | 4:30 |

Plaintiff's Exhibit No. 2—(Continued)

Explanatory Notes:

Contract Carriers—Subletting Prohibited

Rule 27. No contract carrier shall sublet any hauling under any of his contracts, and in the event he is unable to meet the demands of the shipper for transportation of goods under any contract because of lack of facilities or otherwise, arrangements for the transportation of such commodities must be made by the shipper. Carriers subject to the provisions of this rule shall not act as agents of the shipper in such cases. (See Rule 31½). [67]

Common Carriers—Reserve Equipment

Rule 28. Every common carrier shall have sufficient standby equipment to meet all reasonable demands upon him for transportation on occasions when equipment may be withdrawn for ordinary repairs, including such equipment as may be needed for auxiliary or substitution purposes.

Equipment—Complete List on File

Rule 29. Failure of a permit holder to keep on file with the Department at all times a complete list of all equipment used or operated by him under his permit and to keep the same covered by insurance as provided by law shall be grounds for immediate cancellation of his permit. (See Rule 44.)

Insurance—Requirements Of

Rule 30. At the time of filing application for a permit every common carrier, contract carrier and

Plaintiff's Exhibit No. 2—(Continued)

special carrier shall file with the Department liability and property damage insurance written by a company authorized to write such insurance in the State of Washington, covering each motor vehicle (as defined by Section 2, Chapter 184, Laws of 1935) used or to be used under the permit granted, in the amount of not less than five thousand (\$5,000) dollars for recovery for personal injury by one person and not less than ten thousand (\$10,000) dollars for all persons receiving personal injury by reason of one act of negligence, and not less than five thousand (\$5,000) dollars for damage to property, excluding cargo, of any person other than the assured.

The Department may provide for increased or reduced limits in such cases as it may deem in the public interest.

Insurance—Endorsements—Binders

Rule 31. Endorsements, new insurance policies and binders renewing policies shall be filed with the Department not less than ten (10) days prior to termination date of policies then on file in order that they may be in full force and effect on date of expiration of the policies or bonds then in effect.

Rule 32. Repealed.

Insurance—Cancellation

Rule 33. All insurance policies filed with the Department as required by Chapter 184, Laws of 1935, shall provide that the same shall continue in

Plaintiff's Exhibit No. 2—(Continued)

full force and effect unless and until cancelled by at least fifteen (15) days' written notice served on the insured and the Department of Public Service by the insurance company, the said fifteen (15) days' notice to commence to run from the date notice is actually received by the Department.

Policies written to cover temporary permits must be written for a period of not less than the term of the permit, and shall be accompanied by a receipt for full payment of the premium.

All policies filed shall become a part of the permanent records of the Department. [68]

Insurance—Endorsement and Form Of

Rule 34. All insurance policies filed covering liability and property damage shall carry an endorsement in form provided by the Department as follows:

Endorsement

The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935, of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for personal injury, including death resulting therefrom,

Plaintiff's Exhibit No. 2—(Continued)
and/or damage to property (excluding cargo) of any person or persons other than the assured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the assured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment such judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of such judgment.

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

\$5,000.00 for any recovery for personal injury to or death of one person, and subject to the same limits for one person;

Plaintiff's Exhibit No. 2—(Continued)

\$10,000.00 for any recovery for injury to or death of all persons as a result of one accident;

\$5,000.00 for damage to property, excluding cargo, of any person other than the assured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of \$5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, however, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together [69] they shall for the purpose of this endorsement be construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the assured for injuries to or death of employees of said assured engaged in the operation or maintenance of any automobile

Plaintiff's Exhibit No. 2—(Continued)

or any other employee of the assured arising out of or in the usual course of the trade, business, profession or occupation of the assured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Insurance—Carrier Shall Not Misrepresent

Rule 35. No common carrier shall advertise or represent to the public that he is an "Insured Carrier" unless his equipment is covered by property damage, public liability and cargo insurance.

Broker—Forwarder—Common Carrier C.O.D.

Shipment—Bonds

Rule 35½. Each broker or forwarder shall file with the Department and keep in effect a surety bond, or deposit satisfactory security in a sum to be determined by the Department, to be conditioned upon such broker or forwarder making compensation to shippers or consignees for all moneys belonging to shippers or consignees coming into the possession of such broker or forwarder in connection with his transportation service.

Every common carrier handling C.O.D. shipments shall be required to file a bond or deposit security

Plaintiff's Exhibit No. 2—(Continued)

satisfactory to the Department, conditioned upon such carrier making compensation to shippers and consignees for all moneys belonging to shippers and consignees and coming into the possession of such carrier in connection with his transportation service.

The amount or penalty of such security or bond shall be at least five hundred (\$500) dollars; and for carriers having annual gross revenues of twenty thousand dollars and less than fifty thousand dollars, a bond of one thousand (\$1,000) dollars; for carriers having annual gross revenues of fifty thousand dollars and less than seventy-five thousand dollars, a bond of two thousand (\$2,000) dollars; and for carriers having gross revenues of seventy-five thousand dollars or more, a bond of twenty-five hundred (\$2,500) dollars: Provided, That different amounts may be prescribed by the Department in any case where it deems such action advisable or necessary. Such bond shall be terminable on not less than fifteen days' notice to the Department.

No common carrier shall advertise or represent to the public that he is a bonded carrier unless he files a bond with the Department in accordance with this rule.

Accounts—Uniform Classification Adopted

Rule 36. The "Uniform Classification of Accounts and Statistics" hereinafter set forth on pages

Plaintiff's Exhibit No. 2—(Continued)
51 to 67, [70] inclusive adopted by the Department,
issue of May 1st, effective May 1, 1935, entitled:

“Uniform Classification of Accounts and
Statistics for Motor Freight Carriers,”

is hereby prescribed for the use of common, contract and special carriers.

Accounts—Kept in Accordance With
Classification

Rule 37. Each common carrier and special carrier must secure from the Department a copy of the “Uniform Classification of Accounts and Statistics” adopted by Rule 36 hereof, applicable to his business and keep his * * * [71]

Before the Department of Public Service of
Washington

In re Amendment to Rules 33 and 34 of the Rules
and Regulations Covering Motor Freight Carriers.

GENERAL ORDER M. V. No. 68
AMENDING RULES 33 and 34.

Under the provisions of Chapter 184 of the Laws of 1935 as amended, and in the exercise of the general powers therein conferred,

Order

It Is Hereby Ordered That Rule 33 of the Rules and Regulations Governing Motor Freight Carriers, adopted by General Order M. V. No. 55, dated

Plaintiff's Exhibit No. 2—(Continued)

November 1, 1935, be and the same is hereby amended to read as follows:

Rule 33. All insurance policies filed with the Department in accordance with Chapter 184 of the laws of 1935 as amended, shall provide that the same shall continue in full force and effect unless and until cancelled by not less than fifteen (15) days' written notice served on the insured and the Department of Public Service by the insurance company, the said fifteen (15) days' notice to commence to run from the date notice is actually received by the Department. All notices of cancellation or expiration served on the Department shall be in duplicate on forms furnished by the Department, the duplicate to be returned to the insurance company as acknowledgment.

Policies written to cover temporary permits must be written for a period of not less than the term of the permit, and shall be accompanied by a receipt for full payment of the premium.

All policies filed shall become a part of the permanent records of the Department.

It Is Further Ordered That Rule 34 of the Rules and Regulations Governing Motor Freight Carriers, adopted by General Order M. V. No. 55, dated November 1, 1935 as amended by General Order M. V. No. 66, dated March 29, 1939, be and the same is hereby amended to read as follows:

Rule 34. All insurance policies filed with the Department, covering liability and property damage,

Plaintiff's Exhibit No. 2—(Continued)
shall carry an endorsement in the form provided by the Department as follows:

Endorsement

The policy to which this endorsement is attached is written in pursuance of and is to be *contrued* in accordance with Chapter 184, Laws of 1935 of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department [72] of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for bodily injury, including death resulting *therefrom*, and/or damage to property (excluding cargo) of any person or persons other than the assured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement and operated by the assured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such pay-

Plaintiff's Exhibit No. 2—(Continued)

ment; Provided, However, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached. Nothing contained in the policy or any endorsements thereon, nor the violation of any of the provisions thereof by the assured shall relieve the Company from liability hereunder or from the payment of such judgment.

Schedule

(Unless the policy is written for higher limits, in which event the higher limits therein stated shall apply.)

On each motor vehicle used for the transportation of property, the limits of liability shall not exceed:

\$5,000.00 for any recovery for bodily injury to or death of one person, and subject to the same limit for one person;

\$10,000.00 for any recovery for bodily injury to or death of all persons as a result of one accident;

\$5,000.00 for damage to property, excluding cargo, of any person other than the assured, provided that the total recovery for all persons for property damage resulting from one accident shall not exceed the sum of \$5,000.00.

In consideration of the premium stated in the policy to which this endorsement is attached, the

Plaintiff's Exhibit No. 2—(Continued)

Company agrees to cover, in addition to the motor vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, However, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

Where truck and trailer or trailers are used together they shall for the purpose of this endorsement be [73] construed as one unit and liability therefor shall not exceed the limits of liability for one motor vehicle.

This endorsement shall not be construed as covering the legal liability of the assured for injuries to or death of employees of said assured engaged in the operation or maintenance of any automobile or any other employee of the assured arising out of or in the usual course of the trade, business, profession or occupation of the assured.

The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days' notice in writing by the company shall have first been given to the Department of Public Service of Washington, at its office in Olympia, Washington, said fifteen days' notice to commence to run from the date notice is actually received by the Department.

Plaintiff's Exhibit No. 2—(Continued)

Reimbursement Agreement. The insured agrees to reimburse the company for any payment made by the company on account of any accidents, claim or suit involving a breach of the terms of the policy and for any payment that the company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

Attached to and forming a part of Policy No.
..... issued by..... to

Dated at Olympia, Washington, June 8, 1939.

DEPARTMENT OF PUBLIC
SERVICE OF WASH-
INGTON

/s/ RALPH J. BENJAMIN

Supervisor of Transportation

WWD:gr [74]

PLAINTIFF'S EXHIBIT No. 3

In the Superior Court of the State of Washington
In and for the County of Skagit

No. 16431

ARTHUR MILES as guardian ad litem for WIL-
MER BUNNEY, a minor, and individually,
Plaintiff,

vs.

DAVID BUNNEY and CLARENCE BUNNEY,
co-partners doing business as BUNNEY
BROS.; and POUND MOTOR COMPANY, a
corporation, the legal name of which is now
WATKINS MOTOR COMPANY, a corpora-
tion,

Defendants.

JUDGMENT

This cause having come on regularly for trial before a jury on November 4, 1940, plaintiff being represented by his attorneys, Welts & Welts; the defendants, David Bunney and Clarence Bunney, copartners doing business as Bunney Bros., having defaulted; the defendant Pound Motor Company, a corporation, now Watkins Motor Company, a corporation, appearing by its counsel, Shank, Belt, Rode & Cook; and all parties having stated that they were ready for trial; thereupon a jury was duly impanelled and sworn to try said cause, and a

trial was had; plaintiff and defendants having introduced their evidence and rested, then argument of respective counsel having been made; the court before argument having regularly instructed the jury, and the jury having retired to consider its verdict, thereafter on the 6th day of November, said jury having agreed upon a verdict and returned the same in to court, and said jury having been polled and it appearing therefrom that ten of said jurors announced in open court that this was the verdict, the verdict having been received by the court and filed by the clerk thereof, which said verdict, omitting the formal part, read and reads as follows:

We, the jury, duly impanelled and sworn to try the above entitled cause, do find in favor of the plaintiff and against all of the defendants and do assess plaintiff's [75] damages as follows:

| | |
|-----------------------|------------|
| General damages | \$3,000.00 |
| Special damages | 780.20 |

Dated this 6th day of November, 1940.

MYRTLE McCOMAS

Foreman

Thereafter, the defendant, Watkins Motor Company, a corporation, having filed motions for judgment notwithstanding verdict and for a new trial, said motions having come on regularly to be heard before this court and the court having heard the arguments of respective counsel thereon and duly considered said motions and each of them and found

that said motions and each of them should be denied, and an order having been entered by this court denying said motions and each of them and it appearing to the court that judgment should be entered in accordance with said verdict in favor of the plaintiff and against the defendants and each of them, plaintiff now appearing by his attorneys, Welts & Welts, and the defendant Watkins Motor Company, a corporation, by its attorneys, Shank, Belt, Rode & Cook;

Therefore, It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, Arthur Miles as guardian ad litem for Wilmer Bunney, a minor, does have and recover judgment against David Bunney and Clarence Bunney, co-partners doing business as Bunney Bros., and against Pound Motor Company, a corporation, now Watkins Motor Company, a corporation, in the sum of \$3,000.00, together with costs and disbursements herein, and that the said Arthur Miles, individually, on the cause of action for medical expenses and hospitalization assigned to him by Clarence Bunney, does have and recover judgment against defendants David Bunney and Clarence Bunney, co-partners doing business as Bunney Bros., and also against Pound Motor Company, a corporation, whose name is now Watkins Motor Company, a corporation, in the sum of \$780.20, in which said sums said judgments are hereby entered and each of them shall bear interest at the rate of 6 per cent per [76] annum from date hereof; for all of which let execution issue.

To all of which the defendant Watkins Motor

Company, a corporation, excepts and its exceptions are allowed.

Done In Open Court November 13th, 1940.

W. L. BRICKEY,

Judge

Copy received and service accepted November 25, 1940.

SHANK, BELT, RODE

& COOK,

Attorneys for Defendant

Watkins Motor Company,
a corporation.

Vol. 8 Execution Docket Page 256 recorded
Judgement Journal Vol. 18 Page 484.

[Endorsed]: Skagit County, Wash. Filed Dec. 13, 1940. Arthur Eliason, County Clerk. By Will B. Ellis, Deputy. [77]

[Title of Superior Court and Cause.]

CERTIFICATE

I, Arthur Eliason, County Clerk of Skagit County, and ex-officio Clerk of the Superior Court of the State of Washington in and for said county, do hereby certify that the annexed and foregoing is a full, true and correct copy of the Judgment in the above entitled (matter) (action) as the same now appear on file and of record in my office. We further certify that said judgment has not been satisfied of record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 2nd day of October, 1942.

[Seal] ARTHUR ELIASON,
Clerk [78]

DEFENDANTS' EXHIBIT No. A-1
AUTOMOBILE PURCHASE ORDER

Please enter my order for one automobile described as follows:

Make—Model—Color—Motor No.—Serial No.

Used truck 1938 #497

to be delivered on or about Dec. 4, 1940

#18-4295384

Selling Price of Car.....\$700.00

Sales Tax 14.00

License or Transfer.....

Total.....\$714.00

Used Car Allowance.....\$375.00

1935 Ford Truck

Less Payoff

Motor No. 1304989

Net Allowance.....\$

Original Deposit

Cash on Delivery\$339.00

Total Credits\$714.00

Cash Balance Due\$339.00

Insurance

Total\$339.00

Payable as follows:

Cash payable on delivery. We furnish rings and inserts. Housing and short drive shaft.

Memo. of trade in: Make, 1935; Model, Ford;
Year, Truck.

Motor Serial License

Unless otherwise specified hereon no insurance
protecting purchaser is included in price.

This order is not binding until signed and ac-
cepted by an authorized member of the firm. No
agreements not contained herein will be recognized
unless in writing and signed by a firm member.

Salesman, O. A. Pound.

Accepted by, O. A. Pound.

Purchaser, David Bunney.

Address, 207 So. 11 St.

663.00

339.00

324.

[79]

DEFENDANT'S EXHIBIT No. A-2

Ford

Sales

No. 3535

Service

Mt. Vernon, Washington, 1-4-1940

Received of Bunney Bros. Three hundred thirty-
nine & no/100 Dollars \$339.00

1938 Truck in full

| Detail | On Account | On Note | How Paid | ✓ |
|--------|------------|---------|----------|---|
|--------|------------|---------|----------|---|

Amount due

Cash

Pound Motor

Amount paid

Check

Company

Interest paid

Draft

2nd and Broadway

Diset. allowed

Money

Phone 5151

Order

By EM

Balance due

DEFENDANT'S EXHIBIT No. A-3

Know All Men By These Presents: That Bunney Brothers, by David Bunney, 707-11th st., Mount Vernon, Wn. of Skagit County, State of Washington, as mortgagor, is justly indebted to First National Bank of Mount Vernon, Wn., a corporation, as mortgagee, in the sum of Five Hundred Eighty-Five Dollars & 56/100 - - - Dollars, which is hereby confessed and acknowledged. Now, therefore, for the purpose of securing the payment of said sum, the mortgagors do by these presents grant, bargain, sell and mortgage unto the said mortgagee, its assigns and personal representatives, all that certain personal property described as follows, to-wit:

One 1930 Ford Sedan, Motor No. A2058277.

One 1938 One and one half ton Ford Truck, with 157 inch wheel base, Motor No. 4295384 together with all increases and acquisitions thereto, all of said property being now in the possession of said mortgagor, in Skagit County, Washington, and free from all incumbrances.

To Have and To Hold, All and singular, the personal property aforesaid forever; Provided always, and these presents are upon the express condition, that if said mortgagor shall pay, or cause to be paid to said mortgagee, its assigns or personal representatives, the sum of Five Hundred Eighty-Five Dollars & 56/100 - - - Dollars, and interest, according to the condition of one certain Promissory Note payable to First National Bank of Mount Vernon, Wn., to-wit:

Dates of Notes—1-4-40.

Amt. of Notes—Dollars, Cts., 585.56.

Dates notes are due—Mo. Instal. of \$32.52 beginning 2-15-40.

Dates Notes draw interest from Mat.

Notes draw interest at the rate of 8% per After.

Interest payable—Maturity.

also any and all renewals thereof and such other moneys and credits as may be hereafter paid, loaned or advanced to or on account of the mortgagor by the mortgagee during the continuance [81] of this mortgage and not exceeding \$800.00, then these presents to be void and of no effect. But if default be made in the payment of the said sum of money or the interest thereon, or any part thereof, at the time the same shall become due, or any attempt shall be made to remove any of said property from said County, or to dispose of the same without the written consent of the said mortgagee, or its assigns, or if said mortgagor shall fail or neglect to take proper care of any of said property, or if at any time said mortgagee shall deem itself insecure then and thereafter the entire debt secured by this mortgage shall be due and payable, and it shall be lawful, and said mortgagor hereby authorizes said mortgagee to take possession of all the property mentioned herein and foreclose this mortgage, and sell said property pursuant to law, and out of the proceeds of such sale to retain the principal and interest remaining unpaid on said notes, and all costs of such foreclosure sale together with a rea-

sonable sum of dollars, as attorney's fee, paying the overplus, if any there be, to said mortgagor.

The mortgagors further expressly agree that in case the proceeds of said sale shall not be sufficient to pay the amount due on this mortgage and the costs, expenses and attorney's fees upon foreclosure, they will pay the deficiency, and hereby consents that a deficiency judgment may be entered in the event of such foreclosure and sale.

In Testimony Whereof, The mortgagor hereunto subscribes their name this 4th day of January, 1940.

Signed and Delivered in Presence of

H. A. MOLDSTAD

Copy of original

BUNNEY BROTHERS

By **DAVID BUNNEY [82]**

Filing No. 320619

January 5-1940

State of Washington,

County of—ss.

..... Wash.,19.....

Received from and properly filed and indexed in my office, the chattel mortgage, described on the reverse side hereof.

C. P. KLOKE

Skagit Co. Auditor

County Auditor Mount

Vernon, Washington

By

Deputy

..... Wash., 19.....

To the Auditor of County, Wash.:

We hereby acknowledge full payment and satisfaction of the chattel mortgage described on the reverse side hereof, and authorize you to cancel the same on the records of your office and to deliver the original instrument to

(The above form to be used when discharge is made direct to County Auditor.)

To, Mortgagor

We hereby certify that the Chattel Mortgage described on the reverse side of this instrument has been paid and discharged in full, and the County Auditor of said County is hereby authorized to satisfy and cancel the same.

Date at Washington, 19....

Witnesses:

.....
.....
.....

By.....

(The above form to be used when discharge is made direct to Mortgagor.)

State of Washington,

County of—ss.

On this day of 19.....
before [83] me personally appeared
to me known to be the of
the corporation that executed the within and fore-
going instrument, and acknowledged the said in-

strument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of the said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

.....
Notary Public in and for the State of Washington,
residing at in said County.

(If the person executing this release does not personally appear before the Auditor, the above acknowledgment should be executed.)

Received from Auditor of
County, Washington, the mortgage herein mentioned this day of 19.....

.....
No.

**SATISFACTION OF
CHATTEL MORTGAGE**

.....
.....
Mortgagee

TO

.....
Mortgagor

Mar. 14, 1940.

This is to certify that the within is a true and correct copy of Chattell Mortgage given us by Bunney Brothers on within date.

FIRST NATIONAL BANK OF
MOUNT VERNON, WN.

ROY C. GALER

Asst. Cashier

S. WILBUR SPROUSE

[Seal]

Notary

Mt. Vernon, Wash. [84]

District Court of the United States
Western District of Washington
Northern Division

No. 16.

LAURENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor,
Plaintiff,

vs.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Defendant.

VERDICT

We, the jury empanelled in the above-entitled cause, find for the Plaintiff, and fix the amount of his recovery in the sum of Four Thousand Two

Hundred Fifty-eight and 65/100 Dollars, (\$4,258.65).

CARL B. EVJEN,
Foreman.

[Endorsed]: Filed Oct. 7, 1942. [85]

[Title of District Court and Cause.]

JOURNAL ENTRY AS TO DIRECTION OF
ENTRY OF JUDGMENT ON VERDICT

At 4:30 P.M., the jury returns into court with a verdict, counsel for both sides being present. Call of the jury is waived. The verdict is read, as follows:

“We, the jury empanelled in the above-entitled cause, find for the Plaintiff, and fix the amount of his recovery in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars, (\$4,258.65.)”

CARL B. EVJEN,
Foreman.

The verdict is acknowledged by the jury and ordered filed. Judgment on the verdict is hereby entered by the Clerk for plaintiff, pursuant to the provisions of Rule 58 of the Rules of Civil Procedure. [86]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT N. O. V.

Comes now the Associated Indemnity Corporation, a corporation, defendant above named and moves the above entitled court that the verdict of the jury and judgment in the above entitled action be set aside and held for naught and that judgment in favor of the defendant be granted notwithstanding the verdict of the jury upon the grounds and for the reason that the verdict of the jury under the law and evidence should have been in favor of the defendant and against the plaintiff.

Dated this 12 day of October, 1942.

N. A. PEARSON,

Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1942. [87]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Without waiving the defendant's motion for judgment notwithstanding the verdict of the jury made herein but still insisting upon same the defendant moves for a new trial in the above entitled action for the following reasons:

I.

Irregularity in the proceedings of the court, jury or adverse party, and orders of the Court, and

abuse of discretion by which this defendant was prevented from having a fair trial.

II.

Accident or surprise that ordinary prudence could not have guarded against.

III.

Insufficiency of the evidence to justify the verdict, and that it is against the law.

IV.

Error in the law occurring at the trial.

N. A. PEARSON,

Attorney for Defendant.

[Endorsed]: Filed Oct. 13, 1942. [88]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT

This matter having come on regularly before the above entitled Court on this 24th day of October, 1942, upon the motion of the defendant for judgment notwithstanding verdict, and the plaintiff appearing by his counsel, R. V. Welts and Henderson & McBee, and the defendant appearing by its counsel, N. A. Pearson, and the Court having heard the arguments of counsel, having examined the records and files herein, and being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the motion of the defendant for judgment notwithstanding verdict be and the same is hereby denied.

To all of which the defendant excepts and which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 24, 1942. [89]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR
NEW TRIAL

This matter having come on regularly before the above entitled court on this 24th day of October, 1942, upon the motion of the defendant for a new trial, and the plaintiff appearing by his counsel, R. V. Welts and Henderson & McBee, and the defendant appearing by its counsel, N. A. Pearson, and the Court having heard the arguments of

counsel, having examined the records and files herein, and being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the motion of the defendant for a new trial be and the same is hereby denied.

To all of which the defendant excepts and which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

[Endorsed]: Filed Oct. 24, 1942. [90]

In the District Court of the United States
Western District of Washington,
Northern Division

No. 16

LAURENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor,
Plaintiff,
vs.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,
Defendant.

JUDGMENT

This matter having come on regularly before the above entitled court upon this 24th day of October, 1942, upon the application of the plaintiff for the entry of judgment herein, and the above entitled cause having been duly and regularly tried by the above entitled Court on the 7th day of October, 1942, to a jury, and the plaintiff appearing by his counsel, R. V. Welts and Alfred McBee, and the defendant appearing by its counsel, N. A. Pearson and John A. Milot, and both parties having introduced their evidence and rested, and counsel for the respective parties having made their oral argument to the jury, and the jury having retired to consider its verdict and returned with its verdict in open court, which said verdict, omitting the formal parts thereof, read as follows:

“We, the Jury in the above entitled cause, find for the plaintiff and fix the amount of his

recovery in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars (\$4,258.65). Carl B. Evjen, Foreman.”;

and the defendant having timely made its motions for a new trial and judgment notwithstanding the verdict, which said motions have been heard and considered by the above entitled Court, and the above entitled Court having made and entered separate orders denying said motions and each of them, and the Court having examined the records and files herein and being [91] fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed, that the plaintiff be and he is hereby given judgment against the defendant in the sum of Four Thousand Two Hundred Fifty-eight and 65/100 Dollars (\$4,258.65), and for his costs and disbursements herein in the sum of Twenty-seven and 50/100 Dollars, (\$27.50).

To All of Which the defendant excepts, which exception is hereby allowed.

Done in Open Court this 24th day of October, 1942.

JEREMIAH NETERER,
Judge.

Presented by:

R. V. WELTS,
Attorney for Plaintiff.

Approved as to form:

N. A. PEARSON,
Attorney for Defendant.

It is agreed that in the event of appeal bond will be \$5000.00.

WELTS & WELTS,
HENDERSON & McBEE,
Attorneys for Plaintiff.
N. A. PEARSON,
Attorney for Deft.

[Endorsed]: Filed Oct. 24, 1942. [92]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Associated Indemnity Corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on October 24th 1942 awarding to plaintiff the sum of \$4,258.65 with costs in the sum of \$27.50, and from Order Denying Motion for Judgment Notwithstanding Verdict and Order Denying Motion for New Trial entered on the same date and from all orders and rulings in the above entitled action.

N. A. PEARSON,
Attorney for Appellant Associated Indemnity Corporation.

Office and P. O. Address:
413 Arctic Bldg.,
Seattle, Washington.

[Endorsed]: Filed Dec. 12, 1942. [93]

[Title of District Court and Cause.]

STIPULATION FOR APPEAL AND
SUPERSEDEAS BOND ON APPEAL

It is hereby stipulated and agreed that the amount of Appeal and Supersedeas Bond, which includes costs, shall be the sum of Five Thousand (\$5,000.00) Dollars.

Dated this 8th day of December, 1942.

WELTS & WELTS,

By R. V. WELTS,

HENDERSON & McBEE,

Attorneys for Plaintiff

Appellee.

N. A. PEARSON,

Attorney for Defendant

Appellant.

[Endorsed]: Filed Dec. 9, 1942. [94]

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON
APPEAL

National Surety Corporation, New York,
Vincent Cullen, President.

Know All Men By These Presents: That we, Associated Indemnity Corporation, the Defendant above named, as Principal, and the National Surety Corporation, a corporation organized under the

laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Lawrence P. Bunney, as Guardian of Wilmer Bunney, a Minor, the Plaintiff above named in the just and full sum of Five Thousand and no/100 Dollars (\$5000.00), for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of December, A. D. 1942.

The Condition of This Obligation Is Such, that whereas, the above named Plaintiff on the 24th day of October, 1942, in the above entitled action and court recovered judgment against the Defendant above named for the sum of Four Thousand Two Hundred [95] Fifty-eight and 65/100 Dollars (\$4258.65), plus costs of Twenty-seven and 50/100 Dollars (\$27.50); and

Whereas, the above named Principal has heretofore given due and proper notice that it appeals from said decision and judgment of said District Court to the Circuit Court of Appeals;

Now, Therefore, if the said Principal, Associated Indemnity Corporation, shall pay to Lawrence P. Bunney, as Guardian of Wilmer Bunney, a Minor, the Plaintiff above named, all costs and damages that may be awarded against it on the appeal, or on the dismissal thereof, and shall satisfy and per-

form the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the said Circuit Court of Appeals may render or make, or order to be rendered or made by said District Court, then this obligation to be void; otherwise to remain in full force and effect.

**ASSOCIATED INDEMNITY
CORPORATION:**

By N. A. PEARSON,
Its Attorney (Principal).
**NATIONAL SURETY CORPO-
RATION:**

By J. H. LOBDELL,
Attorney-in-Fact.

O. K.:

R. V. WELTS
for WELTS & WELTS,
ENDERSON & McBEE,
Attorneys for Plaintiff.

Approved:

JOHN C. BOWEN,
Judge.

[Endorsed]: Filed Dec. 12, 1942. [96]

[Title of District Court and Cause.]

**DESIGNATION OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY**

Comes now Associated Indemnity Corporation,
defendant above named and appellant and desig-

nates the following as the points upon which appellant intends to rely in said appeal:

1. That under the law and evidence the verdict should have been for the defendant.

2. That the court should have taken the case from the jury and dismissed the case at the close of the evidence and have granted defendant's motion for dismissal.

3. That the Court should have granted defendants motion for judgment notwithstanding the verdict.

4. That the Court should have granted a New Trial.

5. That defendant's insurance policy did not cover the 1935 truck at the time of the injury.

6. That the insurance coverage terminated upon the 1935 truck and was automatically transferred to the 1938 truck on January 4 1940, the day before the accident.

7. That Wilmer Bunney was an employe engaged in the operation maintenance or repair of the truck at the time of the accident and was excluded from the protection of the policy.

8. That said policy excluded any person from its coverage while entering upon, riding in or alighting from said truck. That Wilmer Bunney was injured while entering upon, riding in or alighting from said truck and therefore not covered.

9. That assured under the policy failed to notify the defendant Company promptly of said accident. That the accident happened [97] January 5 1940 and was not reported to the Company until February 1st 1940 to its prejudice.

10. That the policy provided that it did not apply to any accident which occurred after the transfer during the policy period of the interest of the insured in the truck without the written consent of the Company. That the insured parted with and transferred his entire interest in said truck on January 4th 1940 without the written consent of the company. The accident happened January 5 1942.

11. That said policy covered the several liabilities of David Bunney and Clarence Bunney doing business as Bunney Brothers and did not insure the several liabilities of the two individuals. That the use of the truck at said time was the individual liability and operation of David Bunney, Clarence Bunney having no interest therein.

12. That said policy excluded coverage while the motor vehicle was operated by any person under the age of 14 years. That Wilmer Bunney was assisting in the operation of the truck at the time of the accident and was of the age of 13 years.

13. That the Court erred in withdrawing from the jury the following questions:

Delayed notice of the accident.

Whether or not Wilmer Bunney was an employe.

Whether or not Wilmer was entering upon, riding in, or alighting from the truck.

Whether or not Wilmer Bunney operating the truck, or assisting in its operation, he being under the age of 14 years.

The automatic coverage of the policy to cover the 1938 truck and the elimination of coverage on the 1935 truck on which the accident happened.

14. That the Court erred in instructing the jury in the following particulars: [98]

In limiting the jury to the 1935 truck ownership as being decisive of the action and informing the jury that the only question was the ownership of the 1935 truck.

In instructing the jury that the Bunney Brothers were not in the passenger carrying business as indicating that that would have some bearing upon whether or not Wilmer Bunney was riding in, entering upon, or alighting from the truck at the time of the accident.

In instructing the jury that because the truck was not moving Wilmer Bunney could not be said to be riding therein.

In instructing the jury that because the truck was not in motion Wilmer Bunney could not be operating it.

In instructing the jury that the 1935 truck would still be covered until its delivery to Pound Motor Company disregarding the policy statement that coverage ceased on the 1935 truck upon the delivery to Bunney Bros. of the 1938 truck.

In instructing the jury that the 1935 truck had to be put into a deliverable condition before title passed.

In instructing that as long as title remained in Bunney Bros. of the 1935 truck it would be covered by the policy.

15. That the court erred in failing to give defendant's requested instructions as follows:

To bring in a verdict for the defendant.

That "the mere fact that David Bunney desired to transfer the body from the 1935 truck is no indication and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you find that he sold and delivered title of said truck to other parties on January 4th 1940."

If they found that Wilmer Bunney was an employe that their verdict should be for the defendant.

That if they found that Wilmer Bunney was entering upon, [99] riding in or upon said truck at the time of the accident he would not be covered by the policy and that "the word 'riding' does not necessarily mean that the truck would have to be in motion, the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding."

The requested instruction that "You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford truck trading said 1935 Ford Truck to said Pound Motor Company as a part of the purchase price and paying the balance

due on said 1938 Ford Truck in cash and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said insurance written by defendant on said 1935 Truck automatically terminated upon said 1935 Truck and automatically covered the 1938 truck and that the policy did not cover the said 1935 truck after January 4th 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you that there would be no recovery in this case and your verdict must be for the defendant.”

The requested instruction that “the policy did not apply to any vehicle while being operated by any person under the age of 14 years and if you find that said Wilmer Bunney was under the age of 14 years and was assisting in the operation of said truck at the time of the accident then I charge you that said insurance policy did not apply at the time of the accident and your verdict must be for the defendant.”

N. A. PEARSON

Attorney for Defendant.

[Endorsed]: Filed Dec. 12, 1942. [100]

[Title of District Court and Cause.]

STIPULATION FOR RECORD ON APPEAL

It is hereby stipulated and agreed between Plaintiff by his attorneys Welts & Welts and Henderson

& McBee and Defendant by its attorney N. A. Pearson, that the Clerk of the above entitled Court shall prepare and send to the Circuit Court of Appeals the following Record on Appeal.

Complaint.

Removal papers from State Court, including in this all the papers sent to the District Court from the State Court.

Answer, complete with all defenses etc.

Reply.

Reporter's transcript of evidence and proceedings entitled "Bill of Exceptions."

Verdict and direction of entry of judgment thereon.

Judgment.

Motion for Judgment Notwithstanding the verdict of the Jury.

Motion for New Trial.

Order Denying Judgment Notwithstanding the Verdict of the Jury.

Order denying New Trial.

Judge's "Certification of Statement of Facts on Pre-Trial Hearing."

All Exhibits.

Stipulation for Bond.

Notice of Appeal with date of filing.

Appeal and Supersedeas Bond.

Stipulation for Record on Appeal. [101]

Designation by Appellant of Points upon which he intends to rely.

Clerk's Certificate.

Defendant's Proposed Instructions.

Nothing other than stated herein need be sent up as part of the Record on Appeal.

N. A. PEARSON

Attorney for Defendant
Appellant.

WELTS & WELTS

HENDERSON & McBEE

Attorneys for Plaintiff
Appellee.

[Endorsed]: Filed Dec. 12, 1942. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD

United States of America,
Western District of Wash.—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 102, inclusive, is a full, true and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by Stipulation of Counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Bellingham, Washington, except as to the Reporter's transcript of testimony (entitled Bill of Exceptions), the original of which is enclosed herewith as part of the record on appeal in this cause, and that the same constitute the rec-

ord on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [103]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the Appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

| | |
|--|---------|
| Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 229 folios at 15c | \$34.35 |
| 76 folios at 05c (copies furnished) | 3.80 |
| Appeal fee (Sec. 5 of Act) | 5.00 |
| Certificate of Clerk to Transcript of Record | .50 |
| <hr/> | |
| Total | \$43.65 |

I further certify that the foregoing amount has been paid to me by the attorney for the Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 12th day of January, 1943.

[Seal]

JUDSON W. SHORETT,

Clerk United States District
Court, Western District of
Washington.

By MAUD R. ROGERS,
Deputy. [104]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that, heretofore and on, to wit, the 7th day of October, 1942, at the hour of 10:00 o'clock A. M., the above entitled and numbered cause came on for trial before the Honorable Jeremiah Neterer, one of the Judges of the above entitled Court, presiding at Bellingham, Whatcom County, Washington, sitting with a jury.

The plaintiff appearing by R. V. Welts, Esq., of the firm of Welts & Welts, and by Alfred McBee, Esq., of the firm of Henderson & McBee, his attorneys and counsel; the defendant appearing by and through N. A. Pearson, Esq., its attorney and counsel.

And both sides having announced they were ready to proceed to trial, and a jury to try the cause having been duly empanelled and sworn to try said cause;

Whereupon, the following proceedings were had and testimony given, to wit:

Mr. Pearson: We, at this time, ask for the exclusion of all witnesses.

Whereupon the witnesses were sworn, and excluded from the court room.

Mr. Welts: May it please the Court, Ladies and Gentlemen of [1*] the Jury:

By the Court: (Interrupting) This Certificate, of course, is final as to everything that it contains.

* Page numbering appearing at foot of page of original Reporter's Transcript.

By Mr. Welts: My name is R. V. Welts. I practice law in Mount Vernon, and have for the past twenty-eight years. Mr. McBee, also, seated at the table, is an attorney from Mount Vernon, and we are representing the child, Wilmer Bunney, who is bringing this action through his Guardian, his grandfather, who, in law, as guardian for the child has to bring this suit in the guardian's name. The action is against the Associated Indemnity Corporation, which is an insurance corporation, represented by Mr. Pearson and Mr. Milot.

The suit, as the Court has told you, is on a judgment. There was a prior trial, and the child was awarded some \$3800.00, the amount the Court will tell you later, because of burns and injuries that he received when gasoline became ignited or exploded and flew over his clothing as he was pouring gasoline, at the request of the Bunneys, into the carburetor of a stalled truck.

We held, yesterday, what is known as a pre-trial conference under the law. The Court calls the lawyers in, and they try to settle some of the facts and questions involved, and many of them were settled so that witnesses will not be called to testify to many of the facts, because the Court has written a Certificate as to what those facts are, and I assume that it will be read to the jury as a part of the evidence.

Now, just so that you may understand what this is about, before I read what the Court says are facts that [2] are agreed upon, let me say this: David Bunney, who was one of the witnesses who

retired, owned an automobile truck, back in 1939, and his brother, Clarence Bunney, owned a truck, and they registered the trucks in the name of Bunney Brothers, and were doing W.P.A. hauling with the trucks and obtained a permit from the State of Washington, from the Department of Public Service, so they could use the public roads to use their trucks upon.

David Bunney was doing this hauling with his truck, and wanted a better truck necessary to do that hauling, and he negotiated with a local company there, known as Pound Motor Company, after he had been notified by the W.P.A. authorities to have his equipment inspected for continued work on that job. So, to get a newer vehicle to use, along the latter part of December, 1939, and first part of January, 1940, he was negotiating with Pound Motor Company, of Mount Vernon, for a 1938 Ford chassis and cab. The truck which he owned—and this is a little bit complicated, but I think you will follow it—the truck which he owned was a 1935 truck. It had on it a steel body. In the negotiations to turn his truck in and get the newer truck, ultimately the two parties, that is, Mr. Bunney and the Motor Company, agreed that there would be an allowance of \$375.00 made for the 1935, the old truck, but that Mr. Bunney would keep the steel body that was on it; the motor company would not get the steel body, but there was another, wooden body on another truck that the Bunneys had, and the motor company was to get the 1935 truck with

the wooden body put on it and delivered to Pound Motor Company. [3]

On the 4th day of January, the parties came to an agreement on the amount of money involved and, at that time, Mr. Bunney drove the new truck around, and was satisfied. It was just a bare truck, just the chassis and cab; there was no body on it, you understand. And they agreed on the amount of money that would be paid for the new truck and the amount of credit that would be given for the old truck. Mr. Bunney then paid the difference and drove the 1938 chassis and cab away, but the steel body had not been taken off the equipment that Pound Motor Company was to buy, and when he paid the balance and took the new chassis away, he turned over to Pound Motor Company the registration certificate on it, but there still had to be the change of bodies to make. At that time, the steel body was still on the truck that Pound Motor Company was ultimately to get, and Mr. Bunney was to put the right body on that truck, take the steel body off and put it on the one he had acquired, and then deliver the old truck down town to the Pound Motor Company, thereby completing the deal.

At the time that he took the new truck away, I think the evidence will show, and I think the Certificate of the Court shows it—I will read it in just a minute—that Mr. Bunney said, or testified, or would testify that he asked Pound Motor Company if he could keep the old truck a few days,

because he was busy, before changing the bodies, and Pound Motor Company said change the bodies and deliver the 1935 truck as soon as you can.

The next day, January 5th, is the day this accident happened. On that day, he got another brother—David [4] Bunney did—Daniel Bunney, to help him to take the steel body off the old truck, put it on the new chassis, get the wooden body and put it on the old truck, and then he was going to deliver the old truck to Pound Motor Company. The young man lived in Mount Vernon, up on the hill. The 1935 truck with the steel body on it was then situated in a stub street, a dirt street, right adjoining the Bunney home, that is, the child's home. David Bunney and the brother moved the old truck with the steel body on it to take it close to the yard so they could take the steel body off to put on the other truck and, after they had moved it a short distance, one wheel dropped down in a soft spot in the road, and they couldn't make it go any farther on its own power. It tilted, and it wouldn't get gasoline fed through the fuel pump into the carburetor; it wouldn't go. After trying to move it on its own power, David Bunney then hooked the new chassis onto the old truck with a chain and tried to pull it, but that didn't work. Leaving the two vehicles hitched together with the chain, David Bunney then called to this child, who was playing basket ball in the yard adjoining—he was a fifteen year old boy, in school, then—to come over to the truck to pour some gasoline

into the carburetor. He called him the second time to come over, and the boy came over then, and he handed him a tomato can and told the child to pour the gasoline into the open carburetor. The child took the can of gasoline, and I am not exactly clear as to how he did it, but I think as he explained it this morning, he leaned across the fender with one foot dangling down on the ground, and was pouring the [5] gasoline into the open carburetor. Now, the brother, Daniel, the child's uncle, was seated at the steering wheel of this old truck and had been trying to start it, and was then probably trying to start it. The uncle, the other uncle, David Bunney, who had called the child there to do this, and who owned the equipment, was seated in the second truck to furnish pulling power with that vehicle.

In the process of starting the truck, either through the combined efforts of the two men, one at the wheel of the steel truck and the other pulling with the other truck, the fact was that the motor backfired and, as the child was pouring this gasoline out of an open can, when the motor truck backfired, this exploded and the gasoline went all over the child and the child was completely aflame. They got him put out, and he was in the hospital for some time, and for that, the judgment was recovered against Bunney Brothers. That judgment is owned by the guardian and is unpaid. Bunney Brothers had coverage with the Associated Indemnity Corporation, the defendant here, in

amounts greater than the judgment, and the guardian now, by this suit, asks you to find that he should collect the judgment from the insurance company under the policy which will be before you.

Now, as to the things that do not have to be proven, I will read this Certificate as the result of the conference between the lawyers and the Court yesterday under the court procedure that we have nowadays to try to shorten things so we won't have to put so many witnesses on the stand to take your time: [6]

(Reading) "This cause coming in for pre-trial hearing under Rule 16 of the Rules of Civil Procedure, plaintiff appearing by Messrs. Welts & Welts and Messrs. Henderson & McBee, and defendant appearing by Mr. N. A. Pearson, and the hearing on pre-trial having been had, the following facts were found and certified by the Court:

"On January 4, 1940 the Registration certificate for the truck on which the accident happened was delivered to Pound Motor Company, and Bunney, the owner of the old truck on which the accident happened stated that he desired to take the steel body off his old truck and put it on the new truck and put on the old truck the wooden body which was to be a part of the equipment bought by Pound.

"When the certificate of title was delivered"—that is the ownership certificate that we are always supposed to keep in our safe box, but don't. "When the certificate of title was delivered Bunney said,"

to Pound, "When I come to take delivery on the 1938 truck I asked him if I could have the 1935 truck a few days, that I was going to be rather busy. 'Yes,' he said, 'but will you change the bodies and bring it down as soon as you can.' I said I would."

Bunney would testify to that, should we put him on the witness stand.

"It is agreed that the statement of facts in Cause No. 16431 in the Superior Court of Skagit County, entitled Arthur Miles as Guardian ad litem for Wilmer Bunney, a minor, and individually, Plaintiff, vs. David Bunney and Clarence Bunney, etc., et al, defendants, is a correct transcript of the testimony in that case and may be used [7] on the trial of this case for reference purposes without calling the official court reporter who transcribed the same."

That doesn't interest you at all. It is simply agreeing that, when the other case was tried, this was the testimony that was given there, and if anybody wants to examine that they may do so without calling the court reporter from Mount Vernon. If either lawyer wants to use it in examining further any witness.

(Reading) "It is agreed that the following defendant's exhibits may be considered without any further proof and are only open to objection on the question of materiality on the trial, to wit:

"A-1, Automobile Purchase Order.

"A-2, Receipt,

"A-3, Chattel Mortgage,

same being photostatic copies of originals.

“The following Plaintiff’s exhibits are admitted in evidence as follows:

“1. Copy of insurance policy issued to David Bunney and Clarence Bunney by the defendant Associated Indemnity Corporation on December 14, 1939”—That would be before this accident happened—“and expiring December 14, 1940”—that would be long after the accident happened—“being insurance policy No. 253987 together with all endorsements placed thereon by the defendant and being the policy and endorsements in this law suit. Also the certified copy of the permit issued by the Department of Public Service of the State of Washington to David and Clarence Bunney dated October 16, 1939 and in effect until the time subsequent to the injury herein in question under [8] which David Bunney was operating his vehicle.

“Attorneys for the defendant”—That is Mr. Pearson—“do not admit that the permit was in effect at the time of the injury.

“2. Certified copy of Rules 30,—”

On that score, as to whether it was in effect or not, my evidence will be that the permit and the exhibit bears the Certificate of the Secretary of the Department of Public Service of the State of Washington, under his seal, saying that it was in effect. If he has some evidence showing it was not, then he will have to produce it, but my evidence is in effect that it was, because when you operate a truck on the highway doing hauling under the

Public Service laws, the Department of Public Service has charge over that, and you have to get a permit from the State to do it, and the law requires that the operator has to file with the State an insurance policy and keep it in force to protect third people, the public, or any one who might be injured by the equipment and, pursuant to that, I procured the certified copy of the policy with the certificate that it was in effect at the time of the accident.

(Reading) "2. Certified copy of Rules 30, 31, 33, 34, and General Order No. 68 of the Department of Public Service of the State of Washington, which were in effect on January 5, 1940."

These are the rules and regulations which, under the law, the Department of Public Service made, and had power to make, requiring the filing of insurance policies by permitted operators in order to operate on the highways, [9] and setting out the nature of the endorsements and the guarantees to pay judgments as set forth therein. That is in evidence now, without my introducing it over.

(Reading) "3. Certified copy of the Judgment rendered in Cause No. 16431 of the Superior Court of Skagit County. Said judgment is unpaid and unsatisfied."

No question about that. They admit that; marked Exhibit 3. This is a certified copy of the Judgment of the court down in Skagit County, entered almost two years ago, certified by the County Clerk, under which the child, through his guardian,

recovered damages in the sum of \$3780.20, together with trial costs, and that it bears interest at Six percent from apparently November 13, 1940. There is no question about that. If we are entitled to anything, we are entitled to that amount with interest, which will be figured, I presume, and submitted to you as a lump sum by the Court, so you won't have to figure it out.

(Reading) "It is admitted that the plaintiff"—the one bringing this suit—"is the general guardian of the infant and owns the judgment.

"It is admitted that the Insurance Company is authorized to do business in the State of Washington and is duly licensed, and has paid all fees due the State of Washington.

"It is agreed that the Judgment (Plaintiff's Exhibit 3) was entered for personal injury and necessary and required hospitalization and medical care caused by accident arising from use of the truck named in defendant's policy, being the 1935 truck. [10]

"It is agreed that on the 5th day of January, 1940, pursuant to notice"—It is written notice—"from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the

wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.

“After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the 1938 chassis and cab called the 1938 truck and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks. Thereupon he called to the child Wilmer Bunney who was playing basket ball and told him to come and pour a can of gasoline into the carburetor of the 1935 truck. After the second call the child came, David Bunney giving him a tomato can full of gasoline, removed the flame arrestor from the carburetor of the truck, and the child started to pour the gasoline into the carburetor of the 1935 truck. David Bunney got into the 1938 truck which was physically connected to the 1935 truck and pulled on the 1935 truck. The brother Daniel Bunney was sitting in the 1935 truck at the steering wheel to guide it. It is in dispute between the parties whether the back firing of the motor of the [11] 1935 truck was produced by Daniel Bunney attempting to start the motor with the starter of that truck, or whether it was produced by the action of David Bunney in pulling on the 1935 truck with the 1938 truck.”

We will let the witnesses tell what they did.

“The defendant has no testimony to offer”——

Now, just before I read that, the Insurance Com-

pany claims that, among other things, after the accident happened on the 5th, they were not notified until the first of February, a lapse of some two or three weeks, twenty-six days, I guess, twenty-six or twenty-seven days, and we replied to that, as soon as they were notified, a few weeks later, they were not prejudiced in any way, and they say: (Continues reading) "The defendant has no testimony to offer that it was prejudiced by reason of the failure to give notice of the accident at the time it occurred instead of February 1, 1940."

Then, I say: (Continues reading) "The plaintiff will offer affirmative testimony that the defendant was not and could not be prejudiced by failure to give such notice for the following reasons:

"First, the only persons present when the accident occurred were the mother of the child, the child, Daniel Bunney and David Bunney. Immediately following notification to the insurance company its representative came to Mount Vernon and contacted Mr. R. V. Welts who took the representative to the Clarence Bunney home and saw that he met Mrs. Bunney, the child's mother, and interviewed her in Mr. Welts' presence, and was authorized by Mr. Welts to interview her if he wished in my absence,"— [12] In other words, I took him up an introduced him, and said talk to them if you want to, and he did so in my absence—(Continuing reading) "and took a complete statement of all facts which she knew. He was also put in touch with the brother Daniel Bunney, and his own policy

holder David Bunney, interviewed them and each of them and took statements from them pertaining to the accident. That all of these parties continued to reside in Mount Vernon for a period of time after they were interviewed by the insurance company, and thereafter the child and his parents moved to Everett where they have been and are now located. The operators of the Pound Motor Company who had anything to do with the truck transaction here in question were G. A. Pound and Orville Pound and none other. They remained in Mount Vernon and were interviewed by the insurance company. G. A. Pound is still there and the son Orville is at Fort Lewis having been in the armed services now for only a few months. No facts known by plaintiff's counsel were withheld from the insurance company."

Those are the things that I offered to prove to show that the insurance company was not prejudiced because of that short time from January 5th to February 1st in the insurance company's policy holder telling them that this had happened.

(Reading) "The defendant has no refuting evidence to offer."

The Court then says: (Reading) "The only open issue upon the facts is the ownership of the 1935 truck at the time of the accident and whether the child was standing [13] on the ground or whether he was sitting on the fender of the truck at the time the gasoline was poured into the carburetor, and what Daniel Bunney and David Bunney were

doing at the time of the accident with relation to starting the 1935 truck and the pulling by the 1938 truck, and Daniel Bunney stepping on the starter of the 1935 truck."

Those are the only three things upon which evidence will be introduced before you: the ownership of the 1935 truck at the time the accident happened is one; whether the youngster was on the ground or on the fender of the truck when he was doing the pouring, purely a technical thing; and, third, what the two men were doing with the trucks, that is, whether one man was stepping on the starter, and what the other man pulling the truck did. Now, those are the things that evidence will be submitted upon.

Our evidence produced upon the witness stand, ladies and gentlemen of the jury, will be that Bunney still had the ownership of the old 1935 truck, and he continued to have that ownership under the law——

By the Court: We will have the argument later.

By Mr. Welts: Which will be proven by these circumstances:

Mr. Pound and the salesman who made the deal testified, and will testify that, on the sale transaction, and as a part of the sales transaction, Bunney agreed and he was to put the old truck in deliverable condition, so it could be delivered, by taking off the steel body, which belonged to him, and putting back on it the wooden body which Pound had purchased, and that Bunney was to deliver [14] the

truck thus assembled down to the Pound Motor Company, and that was part of Bunney's agreement under the sale, and our position before you in this court is that, until those things had been done, full ownership of the truck did not go to Pound; therefore, Bunney owned it at the time the accident happened, and those are the facts that will be produced to show you that Bunney owned the truck and his insurance policy covered.

On the other two issues, the child will be called and will tell you where he was when he was pouring the gasoline, and Daniel and David Bunney will be called and tell you what each of them was doing at the time the truck back fired and the child was injured. That is the evidence that we will offer.

By Mr. Pearson: Your Honor, Ladies and Gentlemen of the Jury: I could reserve my statement until the close of plaintiff's case, but I believe that you are entitled to know at this time just what we contend so that you will be able to intelligently weigh the evidence as it comes from the witness stand. Counsel told you I am Mr. Pearson, and my associate, Mr. Milot, are the attorneys for the insurance company. The general statement of Mr. Welts is largely illustrative of what happened out there.

The facts remain, however, that our policy covered the 1935 truck—now, just remember the 1935 and 1938 truck. That is all the essence involved in the case, and it won't sound half so confusing. I will admit that it took me a long time to get these

trucks and truck bodies and things assembled. The 1935 truck and the 1938 truck are the only trucks involved. The insurance policy [15] which is here in evidence shows you that this insurance policy was written on the 1935 truck. This accident happened on the 5th of January, the day after the trucks were exchanged.

On January 4th, the day before the accident, Bunney went down to the Pound Motor Company and traded in his 1935 truck on the 1938 truck, took the 1938 truck out and put a mortgage on it and raised the \$339.00, and took that back to Pound Motor Company, and that paid for the 1938 truck, which then was his when he took delivery of it. Then, on the 4th day of January—now this is after the deal was completed; they had agreed before this that he was to have the steel body on the 1935 truck and put his old wooden body on the 1935 truck and give the Pound Motor Company the old 1935 truck with the old wooden body. That is all agreed. The money had passed. Pound had gone out there and seen the wooden body and saw the chassis and was satisfied. He bought it.

Now, after Bunney took the 1938 truck, after he had paid for it, and after he had mortgaged it, he said to Pound, "I would like to have a few days before I transfer the body." "That's all right," Pound says, "do it as soon as you can and bring it in." So that was the situation then.

On the accident, itself, the testimony will show you, I believe, that at the time of the accident,

Daniel Bunney, another brother, was seated at the wheel of the 1935 truck; David Bunney was on the 1938 truck, had a tow line attached to the 1935 truck which was bogged down in the mud, couldn't move, stalled; that he came out, [16] called over Wilmer Bunney, the young man here, thirteen years of age then; he says: "Come over here and pour some gasoline in this carburetor," and Wilmer came; that he climbed up on the fender and poured the gasoline in the carburetor. It seems there is an air cleaner that they disconnect first so he can pour it in, and when he did that, Daniel Bunney stepped on the starter to start the engine, and the spark ignited the gasoline which caught fire and produced the injuries complained of.

Now, our policy has a number of exclusions in it which I will point out to you, in our defense, set out in the pleadings. As the Court told you, this action is limited to the action on the 1935 truck. It is our contention, of course, that the 1935 truck was owned by the Pound Motor Company. They had title to it. The day before the accident, they took the certificate of title. The certificate of title, you know, not as Counsel says you are supposed to keep in your safe deposit box; he knows, and the law requires you to keep that upon the steering post of your truck. He signed that and delivered it to Pound Motor Company, the day before, for the truck, and passed all title to it.

It is our contention that, in calling Wilmer Bunney over there to pour gasoline into the carburetor,

Wilmer Bunney was working then for the Bunney Brothers at that particular moment. That is not a very long employment, but it was an employment. The policy does not apply under coverage A: (Reading) "This policy does not apply under Coverage A, nor under insurance agreement II, to bodily injury or death of any employee of any insured [17] while engaged in the business of any insured other than domestic employment, or in the operation, maintenance, or repair of the automobile."

It is our contention the evidence will show that this operation in starting the motor was in the maintenance or repair of the automobile to get it going.

The policy also excludes——

By the Court: (Interrupting) Without referring to the testimony, this is really argument. Just say what the testimony will be.

By Mr. Pearson: Yes, Your Honor. The evidence will show that it is what we call a passenger hazard exclusion, as follows: (Reading) "It is agreed that the insurance afforded by the policy shall not apply with respect to liability"——

By the Court: (Interrupting) I said, a while ago, the reading of testimony ought not to be made with the argument. Tell what your testimony will be. That is the argument.

By Mr. Pearson: I think the jury ought to be told what our contentions are.

By the Court: You have stated your conten-

tions. Explain what your testimony is, without reading.

By Mr. Pearson: It has an exclusion also in the policy, and also in the certificate issued by the Department of Public Works, excluding anybody alighting from, riding in or entering upon the automobile. Now, this boy was on the fender, on the truck itself, when he poured this gasoline in.

The evidence will also show you that, although this accident happened on the 5th day of January, it was never [18] reported to the company until February 1st, 1940. The policy—the evidence will show you that the policy provides for automatic coverage of newly acquired equipment; that upon the taking of delivery of the 1938 truck, the coverage of the policy immediately was transferred from the 1935 truck to the 1938 truck, and was immediately extinguished upon the 1935 truck; that there was no coverage upon the 1935 truck at the time of the accident, because he had taken delivery of the 1938 truck and it was transferred to that.

Evidence will also show you that the policy also provides that any change in the ownership of the truck covered by the policy, which is the 1935 truck, automatically terminates and, as I have shown, he transferred title to it the day before to Pound Motor Company.

We will also show that this boy was of the age of thirteen, and that the policy excluded a coverage to anybody under the age of fourteen years assisting in the operation of the truck at that time;

that the policy simply didn't cover at the time of this accident.

That is the position of the defendant at this time. I just tell you these things so you will know our position as you go along.

WILMER BUNNEY,

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Would you state your name?

A. Wilmer Bunney. [19]

Q. You live now where? A. Everett.

Q. Are you in school? A. Yes.

Q. Wilmer, do you remember the occasion when you were hurt with the gasoline exploding and you were burned when you were fixing the truck in January, 1940? A. Yes.

Q. How old are you?

A. Fifteen, now.

Q. What is your birthday; when is it?

A. January 2nd.

Q. And on this day, which was January 5th, 1940, when your uncle gave you the tomato can of gasoline to pour into the carburetor, just tell the jury how you did it, and where you were?

A. Well, I took the can from my uncle and I climbed up on the fender, and I couldn't find—well,

(Testimony of Wilmer Bunney.)

there wasn't no place, so then I got off again, and then I kind of lay straddle of the fender and poured the gas into the carburetor.

Q. You laid straddle of the fender?

A. Yes.

Q. Were either of your feet on the ground when you were laying straddle of the fender, pouring the gasoline?

A. One of them was; it was kind of dangling like.

By Mr. Welts: That's all.

Cross Examination

By Mr. Pearson:

Q. Now, this is a V 8 engine? [20]

A. Yes.

Q. And the carburetor is in the middle, between the two cylinder blocks, is it not?

A. Yes.

Q. That is quite a ways from the edge of the truck, is it not? A. Yes.

Q. It was necessary for you to crawl up on the fender to get over there to pour that gasoline in?

A. Yes.

Q. Now then, do you remember your testimony in the Superior Court?

A. Well, I remember most of it.

Q. You were testifying under oath, were you?

A. Yes.

Q. I will ask you if your testimony there was not this:

(Testimony of Wilmer Bunney.)

“Question: How did you do that?

“Answer: He asked me to pour it in there. The first time I didn’t think it was a good idea, me sitting there or standing up there, so I laid down on there and poured it in.

“Question: Laid down on what?

“Answer: On the fender. It was kind of safer and I was kind of afraid of falling, jerking.

“Question: So you laid on the fender and was pouring gasoline into the carburetor of the truck?

“Answer: Yes.”

That is true, is it? A. Yes.

Q. Now then, who was sitting at the wheel of the truck at [21] the time?

By the Court: That is not cross examination.

Q. (By Mr. Pearson) Who asked you to go on the truck and pour the gasoline in?

A. My uncle.

Q. Which one? A. David.

Q. At the time he asked you to do that, was he in the 1938 truck, or was he on the ground around the car?

A. Well, he was—he sat there and called me the first time and I didn’t pay much attention. The second time——

By the Court: That is not proper cross examination. There is no use going into matters that are not properly before us.

By Mr. Pearson: That’s all.

DANIEL BUNNEY

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Would you state your name?

A. Daniel Bunney.

Q. Where do you live, Mr. Bunney?

A. I live at Route 4, Mount Vernon.

Q. How old a man are you?

A. Twenty-three.

Q. Mr. Bunney, just limiting you now to the occurrence on the 5th of January, 1940, when your brother David and you were moving a truck up near the Clarence Bunney and Wilmer Bunney home, where was that truck that was being moved? [22]

A. It was in the street.

Q. And how did you happen to be helping in moving it?

A. Well, David asked me to help him change boxes on the trucks.

Q. Now, after you started to move it, did one wheel bog down in the soft dirt? A. Yes.

Q. What did David Bunney then do to get it out?

A. Well, he hitched the 1938 truck in front of it, and asked Wilmer to pour some gasoline in the carburetor to get it started.

Q. How did he hitch the 1938 truck onto the 1935 truck?

(Testimony of Daniel Bunney.)

A. We put a chain on the back of the 1938 and on to the front of the 1935 truck.

Q. What did he have you do?

A. He had me step on the starter.

Q. Of what truck?

A. Of the 1935 truck.

Q. Where were you sitting to step on the starter?

A. I was sitting in the driver's seat.

Q. Where with reference to the steering wheel?

A. I was right underneath the steering wheel.

Q. All right. Did you see the child hurt?

A. Yes.

Q. By the backfiring of the motor?

A. Yes.

Q. What were you doing, if you know, when the child was hurt?

A. Well, I got out of the truck and started to help catch the boy. He started to run.

Q. Well, that was after he caught on fire, but I mean at the [23] instant the child was injured, when the explosion occurred, what were you doing?

A. I was stepping on the starter.

By Mr. Welts: You may inquire.

Cross Examination

By Mr. Pearson:

Q. I suppose you had the clutch out at that time of stepping on the starter?

A. I don't remember that.

(Testimony of Daniel Bunney.)

Q. Well, you couldn't start the engine with the clutch in, could you?

A. Not unless I had it out of gear.

Q. You had it out of gear?

A. I don't remember that, either.

Q. Well, if you had it in gear and stepped on the starter, the engine wouldn't run, would it?

A. No. The starter would pull the car if I had it in gear.

Q. The starter wouldn't pull the truck if it was in gear?

A. Well, it would pull it if was all clear; it would pull it ahead.

Q. To start the engine, your first act is to push the clutch out and step on the starter?

A. Yes, take it out of gear, yes.

Q. That is what you did there?

A. I believe it was.

By Mr. Pearson: That's all.

Redirect Examination

By Mr. Welts:

Q. At that time, what was your brother David doing with the [24] truck that was hitched onto the 1935 truck?

A. Well, he was in front. He was going to pull it to get it out.

Q. Do you know whether he was pulling with his truck at the time the motor started?

A. No, I don't remember.

By Mr. Welts: That's all.

(Testimony of Daniel Bunney.)

Recross Examination

By Mr. Pearson:

Q. Where was Wilmer Bunney at the time of this accident?

Mr. McBee: Objected to as improper cross examination.

By Mr. Pearson: I think the rules provide only one Counsel——

By the Court: You say where was the boy that was hurt?

By Mr. Pearson: Yes, Your Honor.

By the Court: Objection sustained. It is not proper cross examination.

By Mr. Pearson: That's all. Except to the ruling of the Court.

DAVID BUNNEY

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. State your name?

A. David Bunney.

Q. At the time that the child Wilmer Bunney was hurt by the gasoline catching on fire and the truck backfiring——

By Mr. Pearson: Those witnesses will remain in attendance, will they not? [25]

(Testimony of David Bunney.)

By Mr. Welts: I presume something should be said to them.

By Mr. Pearson: I would like to have these witnesses that have testified remain in attendance.

By the Court: Bailiff: You will tell the witnesses to remain in attendance.

Q. (By Mr. Welts) On January 5th, 1940, where were you when the truck backfired and the child caught on fire?

A. Well, I was in the 1938 truck at the time of the accident.

Q. Where was the 1938 truck with reference to the 1935 truck?

A. Hooked on in front.

Q. How did you hook onto it?

A. With a log chain.

Q. For what purpose did you hook onto it?

A. To pull the truck out.

Q. Did you see the child at the instant of the explosion? A. No, I did not.

Q. What were you doing with the 1938 truck when the explosion occurred?

A. Well, I was in there ready to pull the other truck out.

Q. Do you know whether or not you were pulling with the 1938 truck when the explosion occurred?

A. I don't just remember now. It is quite a while ago.

Q. You are the defendant in the suit that I got the judgment against, are you?

(Testimony of David Bunney.)

A. Yes sir.

By Mr. Welts: That's all.

By Mr. Pearson: That's all. [26]

G. A. POUND

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Will you state your name?

A. G. A. Pound.

Q. And you live where?

A. Mount Vernon.

Q. Mr. Pound, in January, 1940, in what business were you engaged?

A. I was in the Ford retail business.

Q. Under what name?

A. Pound Motor Company.

Q. And how long have you been in that business, approximately?

A. A little over two years.

Q. Did you become acquainted with David Bunney?

A. I did, yes sir.

Q. When?

A. Well, I had known David Bunney off and on for several months in the latter part of 1939.

Q. Did you have any dealing with David Bunney on behalf of your company the latter part of 1939 and during the first four days of January, 1940?

(Testimony of G. A. Pound.)

A. Yes, I did.

Q. Will you go ahead and tell what that deal was, and what occurred?

A. Well, some time the latter part of December, Mr. Bunney came in, or he was brought into our office to look at a 1938 Ford truck chassis and cab. We negotiated along with him for several days and at last came to an agree- [27] ment with him regarding the sale, or purchase by him of this 1938 Ford chassis.

Q. What equipment did he have, if any, that he wanted you to buy from him in connection with his purchase of the 1938 chassis and cab?

A. Well, when he first came in, or when the deal was first presented to me——

By the Court: (Interrupting) Is it necessary to go into that whole contract of transfer? It seems to me that, under the certificate here, perhaps you are going just a little far afield, opening up a question here that might consume more time.

By Mr. Welts: It would take only a very few moments.

By the Court: It will take more than a very few moments perhaps when Mr. Pearson gets started here.

By Mr. Welts: Well, I thought it was necessary that I show what the deal was in order to show what property Pound was to get, and what was to be done with it?

By the Court: I don't think so, under the certificate here.

(Testimony of G. A. Pound.)

By Mr. Welts: I think that goes to the ownership.

By the Court: I think you can simply state what was done with the deal.

By Mr. Welts: All right. I will put it this way:

Q. As the Court has suggested, Mr. Pound, in making the deal and the sale of the Bunney equipment to you as a part of that consideration of that sale, what did Mr. Bunney agree to do?

A. He agreed to trade in to us a 1935 Ford truck with a wooden body, lined with steel.

Q. And under the agreement, who was to deliver it to you? [28] A. Bunney was.

Q. There was a steel body on that equipment at the time, was there not? A. There was.

Q. What was to become of the steel body?

A. He was to take that off.

Q. And put what on?

A. A wooden body.

Q. And do what else?

A. Well, he was then to deliver it to us.

By the Court: Where was he to deliver it?

Q. (By Mr. Welts) Where?

A. At our place of business in Mount Vernon.

Q. And the steel body wasn't yours at all? Bunney, he was keeping that?

A. He was keeping that.

Q. And state whether or not he was to make the change of these bodies and make delivery to you of the truck before the sale was completed?

By Mr. Pearson: Object to that as a conclusion.

(Testimony of G. A. Pound.)

By the Court: Yes. It is a conclusion of law. When was the truck delivered?

Q. (By Mr. Welts) When did he actually deliver the truck with the wooden body on it?

A. On or about the 20th of January.

Q. Now then, state whether or not that agreement you spoke of with reference to Bunney changing bodies and delivering the vehicle, or agreeing to deliver the vehicle, state whether or not that was made before or at the time that he paid for the new truck? [29]

A. It was made just before, I believe, just the day before.

Q. Now, on that day that he took delivery of the new truck, did he make any request of you to delay his delivery on the 1935 truck?

A. Well, not that day, but a few days after that, he did.

Q. What request did he make?

A. Well, he came down and said he was very busy. He was to deliver the truck on Monday. He was going to change the bodies on a Sunday and he came down Monday or Tuesday and said he had been very busy and couldn't make the change-over, but would make it in a few days and deliver the truck.

Q. Did you agree to that? Did you tell him that was all right? A. Yes sir, I did.

Q. And so, then, he actually delivered at a later date, subsequent to that? A. Yes sir.

Mr. Welts: That's all.

(Testimony of G. A. Pound.)

Cross Examination

By Mr. Pearson:

Q. What date did you deliver the 1938 truck to Bunney?

A. On January 4th—no—yes, January 4th, I believe it was.

Q. And that was the day before the accident?

A. Well, I don't know about the accident at all.

Q. And on that day, did he pay you the difference between the 1935 truck and the 1938 truck?

A. Well, I haven't the records before me, but he possibly did.

By the Court: That is admitted in the exhibits, because the [30] receipts and draft are there.

Q. (By Mr. Pearson) Well, as a matter of fact, it was January 4th that he paid for it?

A. Yes.

Q. And that was January 4th you delivered the 1938 truck? A. Yes.

Q. You went out and inspected the wooden body, did you not, before the deal was finished, before you took in the 1935 truck? A. Yes sir.

Q. Before you agreed to take in the 1935 truck, that is, before January 4th? A. Yes sir.

Q. You went out and looked at the wooden body and saw the 1935 chassis, and decided to take them in on this deal? A. That's right, sir.

Q. The only thing that remained to be done was the transferring of that truck body and put it on the 1935 chassis?

(Testimony of G. A. Pound.)

A. Well, that was part of the consideration of the deal, yes sir.

Q. On the 1938 truck, on January 4th, did Mr. Bunney deliver to you the certificate of title—on the 1934 truck? A. I can't tell you the day.

By the Court: That is admitted in the certificate.

Q. Do you know what the certificate of title is?

A. Yes sir.

Q. What is it?

A. It is a description of the particular truck, motor number and serial number.

Q. Where does it come from? [31]

A. Olympia, Washington.

Q. And the exchange of ownership—

By the Court: (Interrupting) That is all admitted.

By Mr. Pearson: That particular point isn't covered.

By the Court: Oh, yes. It is all admitted. The certificate speaks for itself.

By Mr. Pearson: We haven't got it here.

By the Court: Well, it is admitted that it was issued.

By Mr. Pearson: Very well, then, you got the certificate on the 4th; that is admitted. That's all.

Redirect Examination

By Mr. Welts:

Q. Just one question: You stated, Mr. Pound, that a few days before this deal was—a few days

(Testimony of G. A. Pound.)

before the 1938 truck was taken from the garage by Bunney, you looked at the wooden body that was to be put on the 1935 truck. Where was the wooden body when you looked at it?

A. It was on another truck that was sitting there.

Q. Of the Bunneys'? A. Yes sir.

By Mr. Welts: That's all.

ORVILLE POUND

produced and sworn as a witness on behalf of plaintiff, upon oath testified as follows:

Direct Examination

By Mr. Welts:

Q. Will you state your name?

A. Orville Pound.

Q. And where are you located at the present time? [32] A. Ft. Lewis.

Q. In the early part of January, 1940, where did you live?

A. I lived in Mount Vernon.

Q. And what was your business at that time?

A. I was a salesman working for—I believe at that time I was working for my dad.

Q. Pound Motor Company?

A. Yes sir.

Q. Pound Motor Company was a corporation, was it not? A. Yes sir.

(Testimony of Orville Pound.)

Q. And G. A. Pound, just on the witness stand, is your father? A. Yes sir.

Q. And was manager of that company in the business? A. Yes sir.

Q. And you were the salesman?

A. Yes sir.

Q. Mr. Pound, about January 1st, or a few days before January 1st, 1940, did you, as salesman for the motor company, arrange for a sale to David Bunney of a 1938 truck with cab and chassis only, but no bed, and the acquisition by Pound Motor Company from Bunney of a 1935 truck with certain equipment on it? Did you negotiate such a transaction? A. Yes sir.

Q. And who were your dealings with?

A. Well, they were just with Mr. Bunney.

Q. David Bunney? A. Yes sir.

Q. Did you finally, on behalf of the motor company, come to an agreement as to price and equipment that each would [33] get? A. Yes sir.

Q. Tell me what kind of a body was on the 1935 truck when you were making these deals?

A. There was a steel body.

Q. Under the dealings, when the arrangement was made for the exchange, what was to become of the steel body?

A. Well, the way the deal was worked out, the steel body was supposed to go on the truck he bought from us, the 1938 chassis, and he had a wooden body on another truck and that was sup-

(Testimony of Orville Pound.)

posed to be transferred to the truck we were taking in, the 1935 truck.

Q. At the time you came to terms with this man, prior to January 4th, what agreement did he make with you for the motor company with reference to changing the bodies on the truck and delivering the truck to the motor company?

A. Well, he asked us if he could change the bodies.

Q. Who was to do the job of changing the bodies and bringing the truck down to Pound Motor Company? A. David Bunney.

Q. Did he so agree in the sale that was made?

A. Yes sir.

Q. Now then, when was it with reference to January 1st, say, that you made your sale agreement, your oral arrangements with Bunney?

A. Well, we made an oral agreement, I guess, just a little before we completed the sale.

Q. Finally the purchase order was signed?

A. Yes sir.

Q. And it was in this oral agreement previously that he agreed [34] to change the bodies and deliver the 1935 truck? A. That's right.

Q. When he took the 1938 truck, did it have any body on it? A. No sir.

Q. Now, did he change the bodies and deliver the 1935 truck before January 6th?

A. No; it was some time after that.

(Testimony of Orville Pound.)

Q. And you say you were a salesman and your father was the manager of the company?

A. Yes sir.

Q. I will ask you whether, after you worked out these arrangements, they had to be submitted to your father? A. Yes sir.

Q. Did you so submit them? A. Yes sir.

Q. That is, you told him the deal you had made with Bunney? A. That's right.

Q. And then, did your father approve it, and look at this wooden body that was to go?

A. We drove up and looked at this wooden body and agreed to the change-over.

Q. I take it that was after Bunney had agreed to do the things in connection with the sale?

A. That's right.

Q. Now then, you looked at the wooden body before he took the 1938 truck? A. Yes sir.

By Mr. Welts: I think that's all. [35]

Cross Examination

By Mr. Pearson:

Q. You were satisfied with the wooden body and the 1935 chassis, to take it in on the deal?

A. Yes sir.

Q. All that remained to be done was to transfer the body onto the 1935 chassis, and that was all there was to be done? A. Yes sir.

Q. Handing you Defendant's Exhibits A-1, A-2, and A-3, which is, A-1, automobile purchase order, photostat copies; A-2 is the receipt for \$339.00, and

(Testimony of Orville Pound.)

the other is a chattel mortgage on the 1938 Ford truck. I ask if you recognize those? Are those the instruments covering that deal?

By Mr. Welts: We object to those as immaterial and irrelevant, because we don't question but what, on January 4th, Bunney came into ownership of the 1938 cab and chassis and drove it home.

By Mr. Pearson: And took delivery on that date?

By the Court: I think it is all admitted that the truck was taken over.

Q. (By Mr. Pearson): You recognize those?

A. Yes sir.

By Mr. Pearson: We offer them in evidence.

By Mr. Welts: Object to them as irrelevant and immaterial.

By the Court: These are the photostat copies? Oh, they can be admitted.

By Mr. Pearson: I offer the chattel mortgage at this time, too. [36]

By the Court: I assumed they were admitted yesterday.

By Mr. Pearson: That's all.

By Mr. Welts: Just one moment and I can close, Your Honor, I think. In order that the record may be complete, Your Honor, we had a conversation this morning with reference to certain proof I was going to make. I understood Your Honor to rule that, inasmuch as the defendant had stated that he

had no counter proof to offer, that my proof would be taken as established fact. To put that in the record, so there can be no controversy about it, I now offer to prove by the respective witnesses on the matter of notice——

By Mr. Pearson: I think we can shorten this up.

By the Court: The Court has already ruled upon that. It is not necessary for an offer of proof.

By Mr. Welts: The proof will be that contained as an offer in the Court's statement?

By the Court: The Pre-Trial Certificate.

By Mr. Welts: On pages, commencing with Line 25, page 4, through to line 19, page 5, that is the subject matter I offer to prove, and I take it Your Honor's position is that it is unnecessary and it is considered I don't have to prove.

By the Court: They will speak for themselves. He has no contrary proof to offer. Even though Mr. Pearson had not said he had no proof to offer, I would have declined the testimony.

By Mr. Pearson: It is agreed that we were notified February, 1st, 1940.

By Mr. Welts: That is what you said, Mr. Pearson, and I don't [37] controvert it. We rest, Your Honor.

By the Court: Have you some further testimony?

By Mr. Pearson: Well, I think so. I have a motion to make. I don't think there is anything in dispute as to the witnesses, or the——

By the Court: (Interrupting) Do I understand that both sides close as to the testimony?

By Mr. Pearson: Yes, Your Honor, we rest. I have a motion to make, of course.

Whereupon the Court admonished the jury, and then recessed until 1:30 o'clock P. M., October 7th, 1942, at which time, Counsel being present, the Court re-convened and the following proceedings were had, to wit:

By the Court: Note all the jurors in the box. Proceed.

By Mr. Pearson: We have a motion to present, if your Honor please. I think the jury might be excused.

By the Court: Oh, they will not consider this motion. I will tell them not to.

By Mr. Pearson: Comes now the defendant, Associated Indemnity Corporation, and challenges the sufficiency of the evidence to sustain any verdict against this defendant, on the grounds of failure of proof, and upon the grounds that the evidence shows, undisputed evidence, that the truck was not covered at the time of the accident, and that the policy did not apply to the accident. If your Honor please, the policy——

By the Court: (Interrupting) Is the motion now complete?

By Mr. Pearson: And moves the Court to take the case from the jury and enter judgment of dismissal at this time. Now, in arguing that motion—— [38]

By the Court: (Interrupting) I will state to

Mr. Pearson that I am quite familiar now with the policy and with all the facts. I think I am prepared to rule on the motion now.

By Mr. Pearson: Before Your Honor does, there is just one point more that I want to call Your Honor's attention to, and that is the automatic insurance paragraph.

By the Court: Well, that is a matter likewise which I have fully considered. I am prepared to rule upon it now. I am simply saying that in view of the fact that the jury is not concerned with this matter here and what I say, and I don't want to say any more than is necessary, and the argument would do no good. I feel I have considered that.

By Mr. Pearson: Your Honor has considered the fact that it states in there that, upon the delivery of the 1938 truck, it terminates automatically on the 1935 truck?

By the Court: Yes. We are not concerned with that insurance now in connection with the automatic effect on the new vehicle. We are only concerned with the old vehicle, and I shall have to instruct the jury that it remains on the old vehicle until the title left the Bunneys, and that would include delivery. That issue of delivery is an issue of fact.

By Mr. Pearson: That paragraph, however, you will notice, says upon the delivery of the 1938 truck.

By the Court: Well, that is a question of fact that the Court will not dispose of. I am simply saying that so as to avoid any prejudice of any sort against your client in what I might say further in the matter. Is there any [39] other motion?

By Mr. Pearson: That is my motion.

By the Court: The motion will be denied and exception will be noted.

By Mr. Pearson: It is understood that a lot of argument was made on this yesterday on the Pre-Trial Conference, so that the record will show we have not abandoned that point?

By the Court: Yes. I examined the authorities submitted, and some others, and I have come to the conclusion. You may proceed with the argument. I just want to make this observation, however, that, in view of what has just transpired, I think that the plaintiff's opening argument should take in a full, fair statement of plaintiff's position, not to make a few short remarks and then make your whole argument after the defendant has made his argument. It is to be a full, fair statement.

Whereupon, Mr. McBee argued for the plaintiff; Mr. Pearson argued for the defendant, and Mr. Welts made the closing argument on behalf of plaintiff. At the close of the argument, a short recess was taken, after which, Counsel and all jurors being present, the following proceedings were had, to wit:

By the Court: This, Gentlemen of the Jury, is a civil action to recover on a policy of insurance issued by the defendant company. The complaint indicates as a basis for the claim of the plaintiff, who is a minor and sues by his guardian. The defendant insurance company denies liability, and sets

forth the reasons in its Answer. Pursuant to the law and Rules of the United States Courts, a pre-[40] trial conference was directed. The lawyers met with the Court and agreed upon many facts in this case. A certificate was filed by the Judge, setting out the findings agreed upon, and likewise noted the open issues to be determined by you as a question of fact.

Upon the certificate of admissions made by the respective parties you are not concerned. Those facts are established. The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownership of the truck referred to as the 1935 truck, on the 5th day of January, 1940. That is the date upon which the accident happened. Another open question is the position of the minor plaintiff in this case with relation to the automobile at the time that he was pouring gasoline from his tomato can into the carburetor, whether he was on the car or whether he was partially on the car, or whether he was standing on the ground. And the other is the activity of David and Daniel Bunney at the time of the accident with relation to the attempted movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it. I instruct you that, so far as these last two open issues are concerned, they are not material in this case, and your attention will be directed to the first open issue, and that is: who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident.

The defendant, while admitting the policy, date and issuance of the policy and the endorsements thereon, has, in the evidence, and the answer, claimed that it is not [41] liable by reason of certain exemptions in the policy, which are enumerated, and which have been presented to you, and are outlined in their Answer.

These pleadings, if you desire them, will be sent to the jury room with you, but they are not evidence in any sense, and should not be considered so if they are sent to the jury room. I don't think they will be of much value to you in this case, in view of the certificate of findings and the only open issue left.

The burden of proof in this case is upon the plaintiff to establish all of the allegations of the complaint, to show that the policy was issued and also the rendering of its judgment. The action is predicated not on an open claim of acts of omission or commission or the fault of any one, but it is predicated upon a judgment which has been rendered in favor of the minor against another party, not a party to this suit, for the injury which he sustained, and this is claimed against the insurance company as having indemnified the party against whom the judgment was rendered against any liability thereunder, and if this is sustained, then, of course, the company are going to pay, and that is the real issue.

David and Clarence Bunney were doing business as Bunney Brothers, and pursuant to the laws of

the State of Washington, procured from the Department of Public Service of the State, a Common Carrier Permit, No. 7034, which is in evidence, granting authority, intrastate irregular route and nonradial service, as a carrier engaged in dump truck operations in King, Snohomish and Skagit Counties, and, pursuant to the laws of the State of Wash- [42] ington then in force, procured and filed liability and property damage insurance from the defendant company. David Bunney, doing business as Bunney Brothers, deposited with the Department of Public Service a policy of liability insurance written by the defendant, with various endorsements thereon, by which policy the defendant agreed to pay any final judgment for personal injuries caused by any and all vehicles covered by the terms of the policy, in accordance with the laws of the State, in which policy it was provided that nothing contained in the policy nor in any endorsement thereon, nor any of the provisions therein, shall relieve the company from the payment of such judgment, except such as certain exemptions may provide.

It is provided that liability does not apply to the owner of any hired automobile, or trailer, nor to any employee of any such owner, or when operated by a person under fourteen years of age, and other exemptions.

The plaintiff, having obtained a judgment against others for injury in a court of competent jurisdiction, has a right to maintain this action against the

defendant to recover the amount thereof, unless the right is excluded by some exemptions in the policy.

The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pre-trial hearing, the notice was sufficient and timely given, and could not be urged in this suit as against this boy, and no prejudice did result to the defendant company [43] in making its investigation of all witnesses who were familiar with the facts, and all were then available.

One defense states that the injured boy was an employee and is not covered by the policy. Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, nor performing anything but a casual, gratuitous service. To be an employee requires more than one act of gratuitous service. There must be a continuity of acts, either pursuant to an agreement of the minds, or willingly performed on the one side and acceptance on the other, upon which an implied contract might be inferred, and these acts and these conducts must be done by persons who are competent to enter into arrangements or agreements. The boy in this case was thirteen years of age. He was, therefore, incompetent to enter into this employment, or any other employment, without the consent of his guardian, or without the consent of his father and

mother, or one of both of them, and in this case that was not done, so he was not an employee.

Another exemption urged by the defendant is that the boy was riding upon the automobile when he was injured. This exclusion clause appears in the rider under "Passenger Exclusion Clause," which removes from its operations one entering upon, riding in, or alighting from the automobile.

By Mr. Pearson: If Your Honor please, it also appears in the Public Service endorsement.

By the Court: And it may appear in the Public Service endorsement, as stated by Counsel. To make the applica- [44] tion of this exemption, the relations of the boy to the automobile at the time, the business in which Bunney Brothers were then engaged, and what the boy was doing, must be considered with the term "passenger." It may be said that a passenger, in the ordinary sense of the meaning of the term, and its legal sense as well, is one where the traveller rides in a public conveyance used or provided by the carrier for that purpose, and by virtue of an express or implied contract with the carrier for that purpose for the transportation from one place to another, usually for the payment of a fare, or that which is equivalent to a fair consideration. In this case, the testimony shows that the Bunney Brothers were engaged in a dump truck business, not in passenger service. The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in

any sense, and that did not make him a passenger within the sense of that exemption.

Another exemption urged by the defendant is that it excluded benefits to one injured when the automobile was being operated by one under fourteen years of age. This boy was thirteen years of age, and, it is claimed, was operating the truck, and recovery cannot be had. You are instructed that, within the meaning of this policy, this boy was not operating this truck when he was injured. The truck was not in motion. It was not in a condition where it could be operated. The boy was merely pouring gasoline out of a tomato can into the carburetor, which is the container where the air and gasoline [45] are mixed. The boy did not have control or anything to do with the steering wheel, nor the connecting of the clutch, or disconnecting it, with the power, or anything else save and except as indicated, pouring gasoline from the tomato can into the carburetor, and this exemption, therefore, is not available to the defendant. The operation of the truck was authorized as intrastate irregular route and nonradial service as a carrier engaged in dump truck operations, and they are not engaged in passenger business, nor is there anything to show there was any intent or purpose of carrying the boy on this truck in violation of the permit to operate it, and the fact that the boy may have been sitting astride the fender pouring gasoline does not bring him within the exemption claimed.

You are instructed that, if you find this car, on

the day of the injury of this boy, was delivered to the Pound Agency before the injury, or the title passed to the Pound Agency before the injury, then recovery cannot be had. It is admitted that the transaction was completed before the injury, except as to delivery, but all of the papers had been exchanged and the money paid. The transaction would not be completed, of course, until the delivery was had. If the car was retained by Bunney Brothers for the purpose of taking from it the body to be placed on the new chassis and it was then to be delivered, then the policy would still be in force as to the car and it would be covered by this policy. The owner's certificate, the license certificate, may have been delivered, and the money paid, and still, if delivery of the truck was retained, the ownership would still [46] be in Bunney Brothers so far as this policy is concerned.

You are instructed that, if you find from the evidence in this case that the 1935 Ford truck which was covered by this insurance policy was sold and the title thereto transferred to Pound Motor Company on the 4th day of January, 1940, the day before the accident occurred, then you are charged that the insurance policy no longer applied to the 1935 Ford truck, and a verdict in favor of the defendant must be returned.

You are instructed that, in determining whether the ownership of the 1935 truck was in Bunney Brothers on January 5th, 1940, or whether it had passed to Pound Motor Company, the law then in

force in the State of Washington, among other things, provided that, where there is a contract to sell specific articles, the property in them is transferred to the buyer at such time as the parties to it intended it to be transferred. For the purpose of ascertaining the intention of the parties, regard may be had to the terms of the contract, the conduct of the parties, uses of the trade, and circumstances of the case. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer: Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting the goods in a deliverable state, the property does not pass until such things are done. If the contract requires that the seller do certain things to deliver the goods to the buyer, to pay the freight, or to deliver to a [47] particular place, the property does not pass until the goods are delivered to the buyer, or have reached the place agreed upon.

If you find from a fair preponderance of the evidence that, on January 5th, 1940, that under an oral agreement made between David Bunney, acting for Bunney Brothers, and Pound Motor Company, Bunney Brothers agreed to sell and Pound Motor Company agreed to buy this 1935 truck, and the parties agreed that it was the intention of the parties by such agreement that the actual ownership of this truck was to remain in Bunney Broth-

ers until the body thereon had been exchanged and the truck was delivered to the place of business of the Pound Motor Company by Bunney Brothers, and that this had not been done at the time of the alleged injury to the child on January 5th, then you are instructed that Bunney Brothers were on that day the owners of the truck so far as this policy of insurance is concerned, and the defendant's policy of insurance covered the case and protected other parties for bodily injuries arising out of ownership or use of the truck by Bunney Brothers, according to the provisions of said policy and the endorsements or riders thereon considered as a whole.

You are instructed that, if you find by a fair preponderance of the evidence that at the time here in question Bunney Brothers were the owners of the truck, then the provisions of the policy of insurance and the endorsements or riders thereon, issued by the defendant Associated Indemnity Corporation applied to the operation of the truck. [48]

You are not concerned in this case with the automatic effect of the policy on the 1938 car. We are not concerned with that. We are only concerned with whether the policy covered this 1935 car, and if the car was not delivered pursuant to the arrangement between Bunney Brothers, under their contract with Pound Motor Company, that it was to be delivered, or that possession was to be retained until the bodies were changed and then delivered, then the title remained, so far as this in-

surance is concerned, in Bunney Brothers, and was in Bunney Brothers on the 5th day of January, 1940.

You will consider this case fairly, from a fair preponderance of the evidence. You are the sole judges of the facts, and the sole judges of the credibility of the witnesses who have testified in the case. There have only been a few witnesses here this morning, but you will consider this case fairly, and consider in good conscience as you believe the facts are, and if you are convinced by a fair preponderance of the evidence that this ownership or possession was in Bunney Brothers on the date of the accident, and that they were not to deliver it until after the bodies had been interchanged, then you will return a verdict in favor of the plaintiff.

By a fair preponderance of the evidence does not mean the greatest number of witnesses who testified to a fact in this case. You will have to determine from the reasonableness of the testimony what the facts are, and it will require your entire number to agree upon a verdict. When you have agreed upon the verdict, you will cause your foreman to sign it, whom you will elect upon [49] retiring to the jury room. The form of verdict has been agreed upon. Two forms have been submitted.

If you are not satisfied by a fair preponderance of the evidence that the ownership of this truck was in Bunney Brothers on the date of the accident, then your verdict will be for the defendant, which reads: "We, the jury in the above entitled cause, find for the defendant."

If you are convinced by a fair preponderance of the evidence that they were the owners of the truck on that day, and that the policy was in effect, then your verdict will be for the plaintiff, and fix the amount \$4258.65. That was the amount which the attorneys computed, so as to save you the time of computing the mathematics.

This is the first case that has been submitted to you, at any rate by me, and I doubt whether all of you have worked together. When you get to the jury room, you may have a number of different viewpoints. That is the benefit of the jury system. There are twelve different minds, and unless they see the thing the same way, why they approach it from twelve different viewpoints, and what you want to do is to reason and talk with each other to determine what the true facts are and conclude, and not to arbitrarily hold out on any view which is not justified by any reason. You are not to be controlled by the majority, but the greater weight of opinion is entitled to some consideration. I mention that because we are just starting into the work.

I believe I have covered the case. Are there any instructions requested otherwise? [50]

By Mr. Pearson: We have some exceptions.

By the Court: Do you want them in the absence or presence of the jury?

By Mr. Pearson: I think in the absence of the jury, to save time.

By the Court: The jury may retire with the Bailiff. I may call you back, however. I don't know.

By Mr. Pearson: Comes now the defendant and excepts to the instructions of the Court as follows: Except to the instructions of the Court, and the various instructions given—I cannot name the specific ones because I haven't any specific copy before me—I will do the best I can with the notes I made.

By the Court: All right.

By Mr. Pearson: Excepts to the instruction where it says that the jury is limited to the 1935 truck as decisive of this action, completely eliminating the theory of the case of the defendant that the automatic exclusion in the policy operated to terminate the coverage on the 1935 truck the moment delivery was accepted of the 1938 truck. The Court not only failed to submit that to the jury, but instructed them on that automatic insurance provision that the only question there was the ownership of the 1935 truck, which completely misses the point.

By the Court: Exception noted. I think the instruction was right.

By Mr. Pearson: And excepts to the instructions of the Court removing from the consideration of the jury the matter of whether or not this boy was riding in or upon the truck at the time, and labelling it passenger traffic [51] exclusion, as a matter of fact, not calling attention to the jury that the Department of Public Service endorsement has it in there and does not call it passenger traffic exclusion, but has in there that coverage shall not apply to any claim for bodily injury or death. That should have been given to clear that up.

By the Court: Note an exception.

By Mr. Pearson: Also excepts to the instruction of the Court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate they considered they had no coverage, and it should have gone in, at least for that purpose.

By the Court: Note an exception. I am satisfied with the instruction.

By Mr. Pearson: Also excepts to the instruction of the Court that this boy was not an employee, and the instruction of the Court that he could not make a contract as a matter of law. The boy can make a contract, but it is voidable only, not void, and that is excepted to by the defendant because we believe that he was an employee at the time.

By the Court: Note an exception. There was nothing to indicate he was an employee under the general rule.

By Mr. Pearson: Excepts to the instruction by Your Honor that the Bunney Brothers were not in the passenger carrying service, as indicating that would have some bearing upon the matter, when it would not have in this particular case, because, obviously, a truck driver or operator can [52] carry passengers and not be in the passenger carrying service, and the instruction in that way is prejudicial to the defendant.

By the Court: Note an exception.

By Mr. Pearson: And also excepts to Your

Honor instructing the jury that the boy sitting on the fender did not make him a passenger because of the fact that the car was not moving. The law is that a car need not be moving to have some one riding in it.

By the Court: Note an exception. This was not such a case.

By Mr. Pearson: Excepts also the Court instructing the jury that the boy was not operating the truck because it was not in motion, and the statement that the boy had nothing to do with the operation, when as a matter of fact the defendant believes that he was assisting in the operation of the truck, and the jury should have been instructed that way.

By the Court: Note an exception.

By Mr. Pearson: And also excepts to the instruction of the Court that this boy was not a servant operating or repairing, or engaged in operating, repairing or maintenance of the truck, when we believe he would come under that heading.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court that, if title passed, there was no coverage, but that the 1935 truck would still be covered until the delivery to the Pound Motor Company, when that is not the gist of the matter. The gist of the matter is that the title has nothing to do with the 1935 truck, but upon the de- [53] livery of the 1938 truck, the policy passed from the 1935 truck, and the 1935 truck would not be covered, and there

was a change of interest under the policy which excluded that coverage. That was not covered.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court which applies to undeliverable condition, because that would not apply in this case, because Pound went out there, saw the body, was satisfied with it, saw the chassis, and was satisfied with it, and nothing left to do but put the two together and take them in. I don't believe it is applicable to say they were not in deliverable condition, because they could have been delivered in that condition.

By the Court: Note an exception.

By Mr. Pearson: Excepts to the instruction of the Court also that, as long as the title to the 1935 truck remained in Bunney Brothers, they would be covered, when, under the policy and its various riders and exclusions, that would not be the fact in a number of instances.

By the Court: Note an exception.

By Mr. Pearson: Now, I have some requested instructions the Court failed to give. Excepts to the failure of the Court to give the requested instruction to find for the defendant, because the defendant believes that, under the law and the evidence, that should have been done.

By the Court: That was denied. Note the exception.

By Mr. Pearson: Excepts also to the failure of the Court to give the requested instruction as follows:

“You are instructed that the mere fact that [54] David Bunney desired to transfer the body from the 1935 Ford Truck is no indication, and is not to be taken by you that he had any title in or to said truck on and after the 4th day of January, 1940, if you find that he sold and delivered title of said truck to other parties on January 4th, 1940.”

The failure to give that, I think, was prejudicial to the defendant.

By the Court: Note an exception.

By Mr. Pearson: Except to the failure of the Court to give our requested instruction reading as follows:

“If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant.”

By the Court: Note an exception.

By Mr. Pearson: Except also to the failure of the Court to give our requested instruction that:

“If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word “riding” does not necessarily mean that the truck would have to be in motion, the fact that he was in or on said truck would be sufficient to come within the meaning of the word riding.”

By the Court: Denied. Note an exception. I think I covered [55] it.

By Mr. Pearson: Excepts to the failure of the Court to give the following requested instruction:

“You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers, or either of them, purchased a 1938 Ford Truck trading said 1935 Ford Truck to said Pound Motor Company as a part of the purchase price and paying the balance due on said 1938 Ford Truck in cash and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford Truck then I charge you that said insurance written by defendant on said 1935 truck automatically terminated upon said 1935 truck and automatically covered the 1938 Ford Truck and that the policy did not cover the said 1935 Ford Truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant.”

Failure to give that was certainly a body blow to the defendant, because that was one of the main points we relied upon, was the coverage on the 1935 truck automatically changing upon delivery of the 1938 truck.

By the Court: Note an exception. I think I covered that.

By Mr. Pearson: And finally, excepts to the failure of the Court to give the requested instruction as follows: [56]

“You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of fourteen years and if you find that said Wilmer Bunney was under the age of fourteen years and was assisting in the operation of said truck at the time of the accident then I charge you that said insurance policy did not apply at the time of said accident and your verdict must be for the defendant.”

By the Court: Note an exception. [57]

State of Washington,
County of Whatcom—ss.

I, Charles Rand, Do Hereby Certify that I am one of the Official Court Reporters of the Superior Court of the State of Washington, for Whatcom County; that I reported in shorthand the trial of Cause No. 16, Civil, entitled Laurence P. Bunney as Guardian of Wilmer Bunney, a Minor, Plaintiff, vs. Associated Indemnity Corporation, Defendant, in the United States District Court for the Western District of Washington, Northern Division, at Bellingham, Washington, on the 7th day of October, 1942; that the above and foregoing Bill of Exceptions is a full, true and correct transcript of all of said shorthand notes so taken.

CHARLES RAND

[Endorsed]: Filed Dec. 12, 1942.

[Endorsed]: No. 10349. United States Circuit Court of Appeals for the Ninth Circuit. Associated Indemnity Corporation, a corporation, Appellant, vs. Laurence P. Bunney, as Guardian of Wilmer Bunney, a minor, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed January 16, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

No. 10349

LAWRENCE P. BUNNEY as guardian of WIL-
MER BUNNEY, a minor,

Appellee,

vs.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY AND
DESIGNATION OF PORTION OF TRAN-
SCRIPT OF RECORD TO BE PRINTED

Comes now Associated Indemnity Corporation, Appellant herein and formally adopts the Statement of Points filed by Appellant in the District Court as the points upon which Appellant intends to rely in his appeal to the above entitled Court.

Appellant herein designates and requests that the entire record on Appeal be printed, by which Appellant means the Transcript of Testimony as well as the Transcript of Record. Said Court Reporter's Transcript of Testimony in its entirety which includes all the proceedings in the District Court, including the Court's Instructions and exceptions thereto and exceptions to the refusal to give instructions. Said Court Reporter's Transcript of

Testimony is labelled "Bill of Exceptions". The intention of this designation is that everything sent up by the District Court Clerk as the Transcript of Record be printed save and except the formal parts, such as headings, and like parts which are not printed.

N. A. PEARSON

Attorney for Associated Indemnity Corporation, Appellant herein.

413 Arctic Bldg.,

Seattle, Wash.

Service accepted and copy received this 11 day of January, 1943.

WELTS & WELTS

HENDERSON & McBEE

Attorneys for Appellee.

[Endorsed]: Filed Jan. 21, 1943. Paul P. O'Brien, Clerk.

No. 10349

United States
Circuit Court of Appeals

For the Ninth Circuit.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellant,

vs.

LAURENCE P. BUNNEY, as Guardian of Wilmer
Bunney, a minor,

Appellee,

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED
FEB 15 1943

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellant,

vs.

LAURENCE P. BUNNEY, as Guardian of Wilmer
Bunney, a minor,

Appellee,

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | Page |
|---|------|
| Answer | 20 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record on | 141 |
| Designation of Points Upon Which Appellant Intends to Rely on (DC) | 135 |
| Notice of | 131 |
| Statement of Points Upon Which Appellant Intends to Rely and Designation of Record to Be Printed on (CCA) | 205 |
| Stipulation for Appeal and Supersedeas Bond on | 132 |
| Stipulation for Record on | 139 |
| Supersedeas and Cost Bond on | 132 |
| Bill of Exceptions | 143 |
| Witnesses for Plaintiff: | |
| Bunney, Daniel | |
| —direct | 166 |
| —cross | 167 |
| —redirect | 168 |
| —recross | 169 |

| Index | Page |
|--|------|
| Witnesses for Plaintiff—(Continued): | |
| Bunney, David | |
| —direct | 169 |
| Bunney, Wilmer | |
| —direct | 163 |
| —cross | 164 |
| Pound, G. A. | |
| —direct | 171 |
| —cross | 175 |
| —redirect | 176 |
| Pound, Orville | |
| —direct | 177 |
| —cross | 180 |
| Certificate of Clerk to Transcript of Record on Appeal | 141 |
| Certificate of Clerk to Transcript on Removal | 19 |
| Certification of Statement of Facts on Pre-Trial Hearing, Court's | 34 |
| Complaint | 3 |
| Defendant's Requested Instructions..... | 40 |
| Designation of Points Upon Which Appellant Intends to Rely (DC)..... | 135 |
| Entry of Judgment on Verdict (Journal Entry) | 124 |

Index

Page

Exhibits for Defendant:

| | |
|-------------------------------------|-----|
| A-1—Automobile Purchase Order | 116 |
| A-2—Receipt | 117 |
| A-3—Chattel Mortgage | 118 |

Exhibits for Plaintiff:

| | |
|--|-----|
| 1—Insurance Policy with Attachments.... | 44 |
| 2—Rules 30, 31, 33, 34 and Gen. Order No. 68 of Dept. of Public Service of State of Washington | 97 |
| 3—Certified Copy of Judgment, Cause No. 16431, Superior Court of Skagit County | 112 |

| | |
|---|-----|
| Instructions Requested by Defendant..... | 40 |
| Judgment | 129 |
| Motion for Judgment N.O.V..... | 125 |
| Motion for New Trial..... | 125 |
| Names and Addresses of Counsel..... | 1 |
| Notice of Appeal..... | 131 |
| Notice of Intention to File Petition for Re- moval | 8 |
| Order Denying Motion for Judgment N.O.V... | 126 |
| Order Denying Motion for New Trial..... | 127 |
| Order of Removal | 13 |

| Index | Page |
|--|------|
| Petition for Removal..... | 9 |
| Praeipie for Transcript of Record on Removal | 18 |
| Removal Bond | 16 |
| Removal Papers from State Court: | |
| Certificate of Clerk to Transcript on Re- moval | 19 |
| Complaint | 3 |
| Notice of Intention to File Petition for Removal | 8 |
| Order of Removal..... | 13 |
| Petition for Removal..... | 9 |
| Praeipie for Transcript of Record on Removal | 18 |
| Removal Bond | 16 |
| Summons | 2 |
| Reply | 29 |
| Statement of Points Upon Which Appellant Intends to Rely and Designation of Portion of Transcript of Record to Be Printed (CCA) | 205 |
| Stipulation for Appeal and Supersedeas Bond. | 132 |
| Stipulation for Record on Appeal..... | 139 |
| Summons (Superior Court)..... | 2 |

| Index | Page |
|--|------|
| Supersedeas and Cost Bond on Appeal..... | 132 |
| Transcript of Testimony..... | 143 |
| Verdict | 123 |

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION,
a corporation, *Appellant,*

vs.

LAWRENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S BRIEF ON APPEAL

N. A. PEARSON,
Attorney for Appellant.

Office and P. O. Address:
413-15 Arctic Building,
Seattle, Washington.

FILED

MAR 8 - 1943



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION,
a corporation, *Appellant,*

vs.

LAWRENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor, *Appellee.*

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TABLE OF CONTENTS

| | <i>Page</i> |
|--|-------------|
| Argument | 29 |
| Automatic Coverage Provision..... | 29 |
| Change of Interest, Occurrence of Accident after | 42 |
| Entering Upon, Riding in or Alighting from Truck | 59 |
| Exclusion of Employes..... | 68 |
| Conclusion | 77 |
| Delayed Notice | 73 |
| Jurisdiction | 1 |
| Passing Title | 47 |
| Sale of Truck | 47 |
| Statement of Pleadings and Facts Showing Juris- | |
| diction | 1 |
| Statement of the Case | 5 |
| Specification of Errors Relied Upon | 11 |
| Summary | 25 |
| Truck Not Operated Under Permit..... | 57 |

TABLE OF CASES

| | |
|---|--------|
| <i>Aetna Cas. & Surety Co. v. Chapman</i> (Ala.) 6 Div. 768, 200 So. 425..... | 36 |
| <i>Ash-Grove Lime & P. Cement Co. v. Sou. Surety Co.</i> , 225 Mo. App. 712, 39 S.W.(2d) 434..... | 35 |
| <i>Baltimore Boot etc. v. Jamar</i> , 93 Md. 404, 49 Atl. 847, 86 A.S.R. 428..... | 71 |
| <i>Baxter v. Central West Cas. Co.</i> , 186 Wash. 459, 58 P.(2d) 835 | 77 |
| <i>Breakstone v. Gen'l Parts Corp</i> , 160 N.E. 47..... | 54 |
| <i>Continental Cas. Co. v. Trenner</i> (D.C. Penna.) 35 F. Supp. 643 | 41 |
| <i>Continental Ins. Co. v. Michaels</i> (Tex. Civ. App.) 13 S.W. 465 | 43 |
| <i>Dean v. Niagara Fire Ins. Co.</i> , 24 Cal. App.(2d) Supp. 762, 68 P.(2d) 1021 | 31, 33 |
| <i>Dorsey v. Fidelity Cas. Co.</i> (Tex. Civ. App.) 52 S.W.(2d) 775 | 66 |

| | <i>Page</i> |
|---|-------------|
| <i>Dowell Inc. v. United Pacific Cas. Co.</i> , 191 Wash. 682, 72 P.(2d) 296 | 75 |
| <i>Ehrsam Mach. Co. v. Phenix Ins. Co.</i> , 43 Neb. 554, 61 N.W. 722 | 46 |
| <i>Farmers & Merchants Ins. o. v. Jensen</i> (Neb.) 76 N.W. 577 | 45 |
| <i>Fidelity Union Cas. Co. v. Posey</i> , 178 Ark. 1017, 13 S.W.(2d) 32 | 68 |
| <i>Golden Gate Motor Transport Co. v. Gt. Am. Ind. Co.</i> , 6 Cal.(2d) 439, 58 P.(2d) 374 | 35 |
| <i>Horsfall v. Pac. Mut. Life Ins. Co.</i> , 32 Wash. 132, 72 Pac. 1028 | 75, 76 |
| <i>Insurance Co. v. Ketterlin</i> , 24 Ill. App. 188 | 46 |
| <i>Jamison v. Phoenix Ind. Co.</i> , 40 F. Supp. 87..... | 41 |
| <i>Johnson v. Fed. Life Ins. Co.</i> (No. Dak.) 234 N. W. 661 | 63 |
| <i>Keneagh v. Baker</i> (Tex. Civ. App.) 284 S.W. 321 | 46 |
| <i>Kennedy v. Maryland Cas. Co.</i> , 26 F.(2d) 501..... | 68 |
| <i>Koontz v. Gen. Cas. Co.</i> , 162 Wash. 77, 297 Pac. 1081 | 77 |
| <i>Langdon v. Assn.</i> , 22 Minn. 193 | 46 |
| <i>McColligan v. Penn. R. R.</i> , 214 Pa. St. 229, 63 Atl. 792, 112 A.S.R. 739, 6 L.R.A. (N.S.) 544, Note 37 L.R.A. 40 | 71-72 |
| <i>McLeod v. Aberdeen Brg. Co.</i> , 194 Wash. 418, 143 Pac. 440 | 53 |
| <i>Merchants Mut. Cas. Co. v. Lambert</i> , 90 N.H. 507, 11 Atl.(2d) 361, 127 A.L.R. 483..... | 29, 41 |
| <i>Miles v. Pound Motor Co.</i> , 10 Wn.(2d) 492, 117 P. (2d) 179 | 54, 55, 56 |
| <i>Mitcham v. Travelers Ind. Co.</i> (C.C.A. 4) 127 F. (2d) 27 | 38 |
| <i>Nolley v. Elliott</i> , 178 S.E. 309 | 53 |
| <i>Northern Merc. Co. v. Schultz</i> , 56 Wash. 394, 105 Pac. 850 | 53 |
| <i>Oakes v. Insurance Co.</i> , 131 Mass. 164 | 46 |
| <i>Patrick v. Watson</i> , 55 Wash. 77, 104 Pac. 144..... | 53 |

TABLE OF CASES

v

| | <i>Page</i> |
|--|-------------|
| <i>Provident Life and Acc. Ins. Co. v. Nitsch</i> (C.C.A. 5) 123 F.(2d) 600 | 62 |
| <i>Remington v. Fidelity & Dep. Co.</i> , 27 Wash. 429, 67 Pac. 989 | 76 |
| <i>Reeves v. G. & G. Pumping Co.</i> , 151 So. 679..... | 54 |
| <i>Southern Surety v. Davidson</i> (Tex. Civ. App.) 280 S.W. 336 | 65, 66 |
| <i>Stewart v. No. Am. Acc. Ins. Co.</i> (Mo. App.) 33 S.W.(2d) 1005..... | 68 |
| <i>Strout v. Board of Water Commrs. of Hartford</i> (S.C. Conn.) 97 Atl. 336 | 67 |
| <i>Watson v. Fireman's Ins. Co.</i> , 83 N.H. 200, 202, 140 Atl. 169 | 32 |
| <i>Western Comm'l. Travelers Assn. v. Smith</i> , 85 Fed. 401, 40 L.R.A. 653 | 76 |
| <i>Wilson v. Lamping Motor Co.</i> , 194 Wash. 418, 78 P.(2d) 559..... | 53 |
| <i>Wright v. Aetna Ins. Co.</i> (C.C.A.) 10 F.(2d) 281, 46 A.L.R. 225 | 65 |

TEXTBOOKS

| | |
|--|--------|
| Blashfield, Cyc. of Auto. Law, 474, §4126..... | 63 |
| 5 Couch, Cyc. of Ins. Law, §1151j | 65 |
| 5 Joyce on Insurance 4992, Sec. 28741 | 67 |
| May on Insurance (2d ed.) §534 | 65 |
| 2 May on Insurance (4th ed.) §462 | 67, 76 |

STATUTES

| | |
|--|----|
| Judicial Code §24 | 2 |
| Judicial Code §28 | 3 |
| Judicial Code §128 | 4 |
| <i>Remington's Revised Statutes of Washington:</i> | |
| §6312-2 | 48 |
| §6312-4-(c) | 48 |
| §6312-6-(a) | 48 |
| §5819-19..... | 50 |
| §5829..... | 70 |
| §5836-42..... | 50 |
| §5836-48..... | 50 |

| | <i>Page</i> |
|--------------------------------|-------------|
| Rev. Stat. Sec. 563, 629 | 2 |
| 18 Ruling Case Law 490 | 71 |
| Stat. 18, 470 | 2, 3 |
| Stat. 24, 552 | 2, 4 |
| Stat. 25, 443 | 3, 4 |
| Stat. 36, 291 | 4 |
| Stat. 36, 1091 | 3 |
| Stat. 36, 1094 | 4 |
| Stat. 38, 278 | 4 |
| Stat. 48, 775 | 3 |
| Stat. 50, 738 | 3 |
| U.S.C.A. Title 28, §41 | 2 |
| §71 | 3 |
| §225 | 4 |

**IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ASSOCIATED INDEMNITY CORPORATION,
a corporation,

Appellant,

vs.

LAWRENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor,

Appellee.

No. 10349

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S BRIEF ON APPEAL

**STATEMENT OF PLEADINGS AND FACTS SHOWING
JURISDICTION**

The plaintiff, appellee, at all times herein has been and now is a resident of the State of Washington, residing in Skagit County.

The defendant, appellant, at all times herein has been and now is a corporation organized under the laws of the State of California and a resident of the State of California and has its principal place of business and home office in San Francisco, California.

The amount in controversy is in excess of Three Thousand Dollars (\$3,000.), to-wit, in the sum of

Three Thousand Eight Hundred and Seventeen Dollars and Twenty Cents (\$3,817.20) plus interest costs and disbursements.

The action was commenced in the Superior Court of Skagit County, State of Washington, by serving and filing summons and complaint (Tr. 3) and was removed to the United States District Court at Bellingham, Washington, by the defendant by filing Petition for Removal (Tr. 9), Notice of Intention to Remove (Tr. 8) with Removal Bond (Tr. 16), upon which after appropriate hearing the Superior Court ordered removed to the United States District Court, Western District of Washington, Northern Division (Tr. 13).

The action was for recovery on an insurance policy, issued by defendant corporation and alleged to cover personal injuries received by plaintiff.

The District Court had jurisdiction as shown in the following extract of United States Judicial Code 28 U.S.C.A. Section 41 (Judicial Code, Sec. 24 Amended) :

“The District courts shall have original jurisdiction as follows:

“1. Of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue, or between citizens of different States; or, where the matter in controversy exceeds exclusive of interest and costs, the sum or value of \$3,000, * * * (b) is between citizens of different States, or (c) is between citizens of a State and foreign States, citizens, or subjects. * * * ” (R. S. Secs. 563, 629; Mar. 3, 1875, c. 137, Sec. 1, 18 Stat. 470; Mar. 3, 1887, c. 373, Sec. 1, 24 Stat. 552;

Aug. 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Mar. 3, 1911, c. 231, Sec. 24, 36 Stat. 1091; May 14, 1934, c. 283, Sec. 1, 48 Stat. 775; Aug. 21, 1937, c. 726, 50 Stat. 738).

This suit was removed to the District Court under the following statutes:

28 U.S.A.C. Sec. 71 (United States Judicial Code, section 28 as amended) :

“Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction, by this title (the Judicial Code) which may now be pending or which may hereafter be brought in any State Court may be removed by the defendant or defendants herein to the District Court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction, by this title (the Judicial Code) and which are now pending or which may hereafter be brought in any State court may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State, and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. * * *”
(Mar. 3, 1875, c. 137, Sec. 2, 18 Stat. 470; Mar.

3, 1887, c. 373, Sec. 1, 24 Stat. 552; Aug 13, 1888, c. 866, 25 Stat. 433; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 28, 36 Stat. 1094; Jan. 20, 1914, c. 11, 38 Stat. 278).

The Circuit Court of Appeals has Appellate Jurisdiction in this case under the following:

28 U.S.A.C. Sec. 225 (Judicial Code, section 128, amended) :

“(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

“First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238. * * * ”

“(d) The review under this section shall be in the following circuit courts of appeal; the decisions of a district court of the United States within a State in the circuit court of appeals for the circuit embracing such State; * * * ”

The pleadings necessary to show the foregoing are the

Complaint (Tr. 3).

Answer (Tr. 20).

Notice of Intention to file Petition for Removal (Tr. 8).

Petition for Removal (Tr. 9).

Reply (Tr. 29).

Order of Removal (Tr. 13).

Bond on Removal (Tr. 16).

Notice of Appeal (Tr. 131).

Supersedeas and Cost Bond on Appeal (Tr. 132).

Stipulation for Appeal and Supersedeas Bond on Appeal (Tr. 132).

STATEMENT OF THE CASE

The Associated Indemnity Corporation, defendant and appellant herein, had issued its liability insurance policy to "David Bunney & Clarence Bunney doing business as Bunney Bros." (Plaintiffs' Exhibit 1, Tr. 45 to 95) covering one Ford 1935 1½ ton Dump Truck, which will be hereinafter referred to as the "1935 truck." There are two trucks involved in this case, the other one being a 1938 truck and it will be hereinafter referred to as the "1938 truck." It will be necessary therefore to bear in mind whether the truck being talked about is the "1935 truck" or the "1938 truck."

The policy covered liability and property damage in the sum of \$5000 for one person injured. There being only one person injured we are concerned only with that feature of the policy.

Bunney Bros. were generally engaged in hauling work using a truck under a permit issued by the Department of Public Service of the State of Washington and the policy with endorsements was issued to comply with said permit.

Some days prior to the 4th day of January, 1940, David Bunney, owner of the 1935 truck, negotiated with the Pound Motor Company of Mt. Vernon, Washington, for the purchase of a used 1938 truck. An agreement was finally reached whereby Bunney was to turn in to Pound Motor Company the 1935 truck and pay in addition the sum of \$339.00, the cash balance due after crediting him with the agreed price of \$375.00 for the 1935 truck. Bunney took physical possession and delivery of the 1938 truck on *January*

4, 1940. On this day also he went to the First National Bank of Mt. Vernon, Washington, and placed a chattel mortgage on the 1938 truck with other property, for the sum of \$585.56. On this day also he turned over actual physical possession of the Washington State Registration Certificate covering the 1935 truck to the Pound Motor Company.

The 1935 truck body was made of steel and Bunney desired to retain it and put it on the 1938 truck and it was agreed by the Pound Motor Company that he could do that and that Bunney would transfer a wooden body to the 1935 truck. A member of the Pound Motor Company had viewed the wooden truck body and it was acceptable to him. As hitherto pointed out, all this happened on or before January 4, 1940.

The next day, January 5, 1940, Bunney intended to change the truck bodies. He tried to start the 1935 truck which was standing alongside his house in a stub ended road but it became mired in the mud and would not go further. He therefore arranged with another brother, Daniel Bunney, to take the 1938 truck and help pull the 1935 truck out of the mud. The 1938 truck was fastened to the front end of the 1935 truck with a tow line and by reason of the angle of tippage of the 1935 truck the engine would not start. David Bunney thought that the reason for the failure to start was that the angle of tippage was so great that gasoline would not run from the tank into the carburetor. He therefore summoned Wilmer Bunney, the plaintiff herein, a boy of the age of 13 years, and instructed him to take a tomato can of gasoline and get up on the truck and pour the gasoline into the

carburetor. Wilmer did this and while he was pouring the gasoline into the carburetor David Bunney, who was seated at the wheel of the 1935 truck, stepped on the starter. The spark ignited the gasoline and Wilmer was burned by the resultant flame. According to the testimony at the time no effort was being made by the 1938 truck to pull the 1935 truck.

The accident happened January 5, 1940, and the Insurance company was notified for the first time February 1, 1940.

Wilmer commenced an action against David and Clarence Bunney, doing business as Bunney Brothers, and Pound Motor Company for his personal injuries. He obtained a judgment against Bunney Brothers in the sum of \$3780.00 and costs of \$37.00. The defense of said action was tendered to defendant herein but was declined by the defendant company. Suit was instituted in the Superior Court of Skagit County, Washington, against the defendant Associated Indemnity Corporation which was removed to the United States District Court, Western District of Washington, Northern Division, on account of diversity of citizenship. Trial was had there before Hon. Jeremiah Neterer and a jury resulting in a verdict against the Associated Indemnity Corporation in the sum of \$4258.65.

No notice of the accident was given to the Company until February 1, 1940.

The policy contained the following in Paragraph V on page two (Tr. 78):

“Automatic Insurance for Newly Acquired Automobiles. If the named Insured who is the

owner of the automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the *date of its delivery to him*, subject to the following additional instructions: (1) if the company insures all automobiles owned by the named assured at the date of such delivery, insurance applies to such other automobile if it is used for pleasure purposes or in the business of the named Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named Insured at the *date of such delivery*, insurance applies to such other automobile if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy but only to the extent applicable to the replaced automobile; (3) *the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery*; * * * ” (Italics ours)

That said policy also contains the following under “Exclusions” on page three (Tr. 79):

“This policy does not apply: (2) * * * to any accident which occurs after the transfer during the policy period of the interest of the named insured in the Automobile, without the written consent of the company.” (Defendant Company gave no such consent).

That said policy provided as follows, page three (Tr. 80):

“This Policy does not apply, under Coverages A, B, C and C-1, nor under insuring agreement II while the Automobile is operated by any person under the age of 14 years * * * .”

That Wilmer Bunney was assisting in the operation of said truck at the time of the accident and was of the age of 13 years.

The policy contained under Exclusions on page 3 thereof (Tr. 80) the following:

“This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any Insured, other than domestic employment, or in the operation, maintenance, or repair of the Automobile; or to any obligation for which any Insured may be held liable under any workmen’s compensation law.”

The Policy contains the following endorsement (Tr. 55):

“It is agreed that the insurance afforded by the policy shall not apply with respect to liability arising from accidents to any person while entering upon, riding in or alighting from the automobile.”

That the Department of Public Service Endorsement attached to the policy also contained the same words as stated in the immediately preceding paragraph (Tr. 63).

That said Department of Public Service Endorsement attached to said Policy also contains the following (Tr. 65):

“This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of the said insured engaged in the operation and maintenance of any automobile or any other employee of the in-

sured arising out of or in the usual course of the trade business, profession or occupation of the insured."

The Policy contained the following (Tr. 87):

"9. Notice of Accident, Claim or Suit. Upon the occurrence of an accident written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative."

These questions were raised by instructions given and exceptions thereto and instructions requested by appellant and refused by the court with exceptions thereto; by motion to dismiss at the close of the case and the denial thereof; by motion for judgment notwithstanding the verdict of the jury and denial thereof and upon motion for new trial and denial thereof.

SPECIFICATION OF ERRORS RELIED UPON

The Court erred:

1. In not sustaining appellant's challenge to the sufficiency of the evidence to sustain any verdict against the defendant at the close of the case and in not entering judgment of dismissal at that time, upon defendant's motion for same (Tr. 183) and not granting defendant's Motion for judgment notwithstanding the verdict or granting a New Trial (Tr. 126-127).

2. In limiting the jury to the ownership of the 1935 truck on June 5, 1940; the position of the minor claimant upon the truck at the time of the accident and the activity of David and Daniel Bunney at the time of the accident with relation to the attempted movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it (Tr. 186); then, in the next sentence telling the jury that the last two issues are not material in this case and telling the jury that the first open issue was the ownership of the 1935 truck on January 5, 1940. The charge of the court on this point *in totidem verbis* is as follows (Tr. 186):

“Upon the certificate of admissions made by the respective parties you are not concerned. Those facts are established. The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownership of the truck referred to as the 1935 truck, on the 5th of January, 1940. That is the date upon which the accident happened. Another open question is the position of the minor plaintiff in this case with relation to the automobile at the time that he was pouring gasoline from his

tomato can into the carburetor, whether he was on the car or whether he was partially on the car, or whether he was standing on the ground. And the other is the activity of David and Daniel Bunney at the time of the accident with relation to the attempted forward movement of the 1935 truck by another truck by having it attached to the forward truck and trying to move it. I instruct you that, so far as these last two open issues are concerned, they are not material in this case and your attention will be directed to the first open issue, and that is; who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident. * * *” (Tr. 197).

And the exception thereto is as follows:

“Excepts to the instruction where it says that the jury is limited to the 1935 truck as decisive of this action, completely eliminating the theory of the case of the defendant that the automatic exclusion in the policy operated to terminate the coverage on the 1935 truck the moment the delivery was accepted of the 1938 truck. The court not only failed to submit that to the jury, but instructed them on that automatic insurance provision that the only question there was the ownership of the 1935 truck, which completely misses the point.” (Tr. 197)

“By THE COURT: Exception noted. I think the instruction was right.”

3. The court erred in removing from the consideration of the jury the question of whether or not the plaintiff boy was riding in or upon the truck at the time of the accident under the exemption of the policy and the endorsements excluding coverage to persons

“entering upon, riding in or alighting from the automobile” the court instructing as follows (Tr. 190) :

“Another exemption urged by the defendant is that the boy was riding upon the automobile when he was injured. This exclusion clause appears in the rider under ‘Passenger Exclusion Clause’ which removes from its operation one entering * * * . And it may appear in the Public Service upon, riding in, or alighting from the automobile endorsement as stated by Counsel. To make the application of this exemption, the relations of the boy to the automobile at the time, the business in which Bunney Brothers were then engaged, and what the boy was doing, must be considered with the term ‘passenger.’ It may be said that a passenger, in the ordinary sense of the meaning of the term, and its legal sense as well, is one where the traveller rides in a public conveyance used or provided by the carrier for that purpose, and by virtue of an express or implied contract with the carrier for that purpose for the transportation from one place to another, usually for the payment of a fare or that which is equivalent to a fair consideration. In this case, the testimony shows that the Bunney Brothers were engaged in a dump truck business, not in passenger service. The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in any sense, and that did not make him a passenger within the sense of that exemption.” (Tr. 190)

Exception on Tr. 197-198 as follows:

“And excepts to the instruction of the court removing from the consideration of the jury the matter of whether or not this boy was riding in

or upon the truck at the time, and labelling it passenger traffic exclusion, as a matter of fact, not calling attention to the jury that the Department of Public Service endorsement has it in there and does not call it passenger traffic exclusion, but has it in there that coverage shall not apply to any claim for bodily injury or death. That should have been given to clear that up."

"By THE COURT: Note an exception." (Tr. 198)

"Excepts to the instruction by Your Honor that the Bunney Brothers were not in the passenger carrying service, as an indication that that would have some bearing upon the matter, when it would not have in this particular case, because, obviously, a truck driver or operator can carry passengers and not be in the passenger carrying service, and the instruction in that way is prejudicial to the defendant."

"By THE COURT: Note an exception." (Tr. 198)

"And also excepts to Your Honor instructing the jury that the boy sitting on the fender did not make him a passenger because of the fact that the car was not moving. The law is that a car need not be moving to have some one riding in it."

"By THE COURT: Note an exception. This was not such a case." (Tr. 198)

4. The court erred in removing from the jury the matter of delayed notice given to the defendant in this case. The court instructing as follows:

"The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pretrial hearing, the notice was

sufficient and timely given, and could not be urged in this suit as against this boy and no prejudice did result to the defendant company in making its investigation of all witnesses who were familiar with the facts and all of them were then available." (Tr. 189)

Exception on Tr. 198:

"Also excepts to the instruction of the court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate that considered they had no coverage, and it should have gone in, at least for that purpose."

"By THE COURT: Note an exception. I am satisfied with the instruction." (Tr. 198)

5. The court erred in instructing that the plaintiff boy was not an employee and in instructing that the boy could not make a contract as a matter of law. The court instructed as follows:

"One defense states that the injured boy was an employee and is not covered by the policy. Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, nor performing anything but a casual, gratuitous service. There must be a continuity of acts, either pursuant to an agreement of the minds, or willingly performed on the one side and acceptance on the other, upon which an implied contract might be inferred, and these acts and these conducts must be done by persons who are competent to enter into arrangements or agreements. The boy in this case was thirteen years of age. He was therefore, incompetent to enter into

this employment, or any other employment, without the consent of his guardian, or without the consent of his father and mother or one or both of them, and in this case that was not done, so he was not an employee. * * * ” (Tr. 189)

To which we excepted as follows (Tr. 198) :

“Also excepts to the instruction of the court that this boy was not an employee, and the instruction of the court that he could not make a contract as a matter of law. The boy can make a contract, but it is voidable only, not void, and that is excepted to by the defendant because we believe that he was an employee at that time.”

“By THE COURT: Note an exception. There was nothing to indicate that he was an employee under the general rule.” (Tr. 198)

6. The court erred in instructing that this plaintiff was not a servant operating or repairing, or, or engaged in operating, repairing or maintenance of the truck. The court's instruction on this was as follows:

Page 44: “ * * * Nothing appears in this case to show that the boy was holding anything but a tomato can containing some gasoline, pouring it into the carburetor, not performing anything but a casual, gratuitous service * * * .” (Tr. 189)

and again (Tr. 190) :

“* * * The boy was sitting astride the fender of the automobile, the front fender, pouring gasoline into the carburetor. He had nothing else to do with the car in any sense.” (Tr. 190)

“Another exemption urged by the defendant is that it excluded benefits to one injured when the automobile was being operated by one under fourteen years of age. This boy was thirteen years of age and, it is claimed, was operating the

truck and recovery cannot be had. You are instructed that, within the meaning of this policy this boy was not operating this truck when he was injured. The truck was not in motion. It was not in a condition where it could be operated. The boy was merely pouring gasoline out of a tomato can into the carburetor, which is the container where the air and gasoline are mixed. The boy did not have control or anything to do with the steering wheel, nor the connecting of the clutch, or disconnecting it, with the power, or anything else save and except as indicated, pouring gasoline from the tomato can into the carburetor and this exemption, therefore, is not available to the defendant. The operation of the truck was authorized as intrastate irregular route and nonradial service as a carrier engaged in dump truck operations, and they are not engaged in passenger business, nor is there anything to show there was any intent or purpose of carrying the boy on this truck in violation of the permit to operate it, and the fact that the boy may have been sitting astride the fender pouring gasoline does not bring him within the exemption claimed." (Tr. 191)

To which we excepted as follows:

"Excepts also to the court instructing the jury that the boy was not operating the truck because it was not in motion, and the statement that the boy had nothing to do with the operation, when as a matter of fact the defendants believe that he was assisting in the operation of the truck, and the jury should have been instructed that way." (Tr. 199)

"By THE COURT: Note an exception." (Tr. 199)

"And also excepts to the instruction of the

court that this boy was not a servant operating or repairing, or engaged in operating, repairing or maintenance of the truck, when we believe he would come under that heading." (Tr. 199)

"By THE COURT: Note an exception." (Tr. 199)

7. The court erred in instructing the jury on deliverable condition. The court's instruction being as follows (Tr. 192):

"You are instructed, that in determining whether the ownership of the 1935 truck was in Bunney Brothers on January 5th, 1940, or whether it had passed to Pound Motor Company, the law then in force in the State of Washington, among other things, provided that, where there is a contract to sell specific articles, the property in them is transferred to the buyer at such time as the parties to it intended it to be transferred. For the purpose of ascertaining the intention of the parties, regard may be had to the terms of the contract, the conduct of the parties, uses of the trade, and circumstances of the case. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Where there is a contract to sell specific goods and the seller is bound to do something to the goods for the purpose of putting the goods in a deliverable state, the property does not pass until such things are done. If the contract requires that the seller do certain things to deliver the goods to the buyer, to pay the freight, or to deliver to a particular place, the property does not pass until the goods are delivered to the buyer, or have reached the place agreed upon." (Tr. 192)

To which the appellant excepted as follows:

"Excepts to the instruction of the court which applies to undeliverable condition, because that would not apply in this case, because Pound went out there, saw the body, was satisfied with it, and nothing left to do but put the two together and take them in. I don't believe it is applicable to say that they were not in deliverable condition because they could have been delivered in that condition." (Tr. 200)

"By THE COURT: Note an exception." (Tr. 200)

8. Before the court instructed the jury the following proceedings took place (Tr. 184):

"By MR. PEARSON: Your honor has considered the fact that it states in there, (in the policy) that, upon the delivery of the 1938 truck, it terminates automatically on the 1935 truck?"

"By THE COURT: Yes. We are not concerned with that insurance now in connection with the automatic effect on the new vehicle, *and I shall have to instruct the jury that it remains on the old vehicle until the title left the Bunneys, and that would include delivery. That issue of delivery is an issue of fact.*" (Tr. 184)

and the court did instruct as follows:

" * * * The only issues of fact to be determined by you in this case, as shown by the certificate, are three: The first is the ownership of the truck referred to as the 1935 truck, on the 5th of January, 1940. That is the date upon which the accident happened." * * *

"And your attention will be directed to the first open issue, and that is: who was the owner of the 1935 truck on the 5th day of January, 1940, the date of this accident." (Tr. 186)

And further, the court instructed on this point (Tr. 192):

“If the car was retained by Bunney Brothers for the purpose of taking from it the body to be placed on the new chassis and it was then to be delivered, then the policy would still be in force as to the car and it would be covered under this policy. The owner’s certificate, the license certificate, may have been delivered and the money paid, and still, if delivery of the truck was retained, the ownership would still be in Bunney Brothers so far as this policy is concerned. * * *.”

And further (Tr. 194):

“You are instructed that, if you find by a fair preponderance of the evidence that at the time here in question Bunney Brothers were the owners of the truck, then the provisions of the policy of insurance and the endorsements or riders thereon, issued by the defendant Associated Indemnity Corporation applied to the operation of the truck.”

“You are not concerned in this case with the automatic effect of the policy on the 1938 car. We are not concerned with that. We are only concerned with whether the policy covered this 1935 car, and if the car was not delivered pursuant to the arrangement between Bunney Brothers, under their contract with the Pound Motor Company, that it was to be delivered, or that possession was to be retained until the bodies were changed and then delivered, then the title remained, so far as this insurance is concerned, in Bunney Brothers, and was in Bunney Brothers on the 5th of January, 1940.” (Tr. 194)

To which we excepted:

“Excepts to the instruction of the court also

that, as long as the title to the 1935 truck remained in Bunney Brothers, they would be covered, when, under the policy and its various riders and exclusions, that would not be the fact in a number of instances.”

“By THE COURT: Note an exception.” (Tr. 200)

9. And in instructing along similar lines in the following (Tr. 193):

“If you find from a fair preponderance of the evidence that, on January 5th, 1940, that under an oral agreement made between David Bunney, acting for Bunney Brothers, and Pound Motor Company, Bunney Brothers agreed to sell and Pound Motor Company agreed to buy this 1935 truck, and the parties agreed that it was the intention of the parties by such agreement that the actual ownership of this truck was to remain in Bunney Brothers until the body thereon had been exchanged and the truck was delivered to the place of business of the Pound Motor Company by Bunney Brothers and that this had not been done at the time of the alleged injury to the child on January 5th, then you are instructed that Bunney Brothers were on that day the owners of the truck so far as this policy of insurance is concerned, and the defendant's policy of insurance covered the case and protected other parties for bodily injuries arising out of the ownership or use of the truck by Bunney Brothers, according to the provisions of said policy and the endorsements or riders thereon considered as a whole.” (Tr. 194)

The exception being as follows (Tr. 199):

“Excepts to the instruction of the court that if title passed, there was no coverage, but that the 1935 truck would still be covered until the

delivery to the Pound Motor Company, when that is not the gist of the matter. The gist of the matter is that the title has nothing to do with the 1935 truck, but upon the delivery of the 1938 truck, the policy passed from the 1935 truck, and the 1935 truck would not be covered, and there was a change of interest under the policy which excluded that coverage. That was not covered.

“By THE COURT: Note an exception.” (Tr. 200)

10. The court erred in refusing to give a requested instruction as follows:

“The court instructs the jury that you are to find for the defendant.”

To which the defendant excepted as follows (Tr. 200):

“Excepts to the failure of the court to give the requested instruction to find for the defendant, because the defendant believes that, under the law and evidence, that should have been done.

“By THE COURT: That was denied. Note the exception.” (Tr. 200)

11. The court erred, with the exception thereto, in failing to give the following requested instruction (Tr. 201):

“Excepts also to the failure of the court to give the requested instruction as follows:

“You are instructed that the mere fact that David Bunney desired to transfer the body from the 1935 Ford truck is no indication and is not to be taken by you that he had any title in or to said truck on and after the 4th of January, 1940, if you find that he sold and delivered title

of said truck to other parties on January 4th, 1940.”

“The failure to give that, I think, was prejudicial to the defendant.” (Tr. 201)

“By THE COURT: Note an exception.” (Tr. 201)

12. The court erred with the exception thereto, in failing to give the following instruction:

“Except to the failure of the court to give our requested instruction reading as follows: ‘If you find that Wilmer Bunney was an employee working for either David Bunney or Clarence Bunney at the time he was working on said truck then I charge you that your verdict in this case must be for the defendant’.” (Tr. 201)

“By THE COURT: Note an exception.” (Tr. 201)

13. The court erred with the exception thereto, in failing to give the following instruction (Tr. 201):

“Except also the failure of the court to give our requested instruction that:

“‘If you find from the evidence that Wilmer Bunney was entering upon, riding in or upon, said automobile at the time of said accident that he would not be covered under the policy and your verdict must be for the defendant. In this respect you are instructed that the word “riding” does not necessarily mean that the truck would have to be in motion, the fact that he was in or on the truck would be sufficient to come within the meaning of the word riding.’

“By THE COURT. Denied. Note an exception. I think I covered it.” (Tr. 202)

14. The court erred with the exception thereto, in

failing to give the following requested instruction (Tr. 202):

“Excepts to the failure of the court to give the following requested instruction (Tr. 202):

“‘You are instructed that if you find from the evidence in this case that the 1935 truck was transferred to the Pound Motor Company on January 4th, 1940, and that on said date said Bunney Brothers or either of them, purchased a 1938 Ford truck trading said 1935 Ford truck to said Pound Motor Company as a part of the purchase price and paying the balance due on said 1938 Ford Truck in case and that on said date, to wit, January 4th, 1940, said Bunney Brothers, or either of them, took delivery and actual physical possession of the new 1938 Ford truck then I charge you that said insurance written by defendant on said 1935 truck automatically terminated upon said 1935 truck and automatically covered the 1938 Ford truck and that the policy did not cover the said 1935 Ford truck after January 4th, 1940, and if you find that the accident occurred on January 5th, 1940, then I charge you there would be no recovery in this case and your verdict must be for the defendant.’ “Failure to give that was certainly a body blow to the defendant, because that was one of the main points we relied upon, was the coverage on the 1935 truck automatically changing upon delivery of the 1938 truck.” (Tr. 202)

“By THE COURT: Note an exception. I think I covered that.”

15. The court erred with the exception thereto, in

failing to give the following requested instruction (Tr. 203):

“And finally, excepts to the failure of the court to give the requested instruction as follows:

“‘You are instructed that the policy did not apply to any vehicle while being operated by any person under the age of fourteen years and if you find that said Wilmer Bunney was under the age of fourteen years and was assisting in the operation of said truck at the time of the accident then I charge you said insurance policy did not apply at the time of said accident your verdict must be for the defendants.’

“By THE COURT: Note an exception.” (Tr. 203)

SUMMARY

A summary of the case is as follows:

Associated Indemnity Corporation, appellant herein, defendant below; issued its insurance policy to David Bunney and Clarence Bunney doing business as Bunney Brothers, covering a 1935 truck owned by David Bunney for liability and property damage. The policy with a number of endorsements attached thereto is in evidence (Tr. 45 to 95).

The policy provided, as is set out fully in the Statement of the Case *ante* that if the insured acquired ownership of another automobile to replace the one insured then the insurance transfers to the newly acquired automobile and automatically terminates upon the replaced automobile at the date of the *delivery* of the *new* automobile to the insured (Tr. 78).

The policy also provided that it did not apply to any

accident that occurred after the transfer during the policy period of the interest of the insured in the automobile, without the written consent of the company (Tr. 79).

The policy also did not apply while the car was being operated by any person under the age of 14 years (Tr. 80); nor to the bodily injury or death of any employe of the insured or in the operation, maintenance, or repair of the automobile (Tr. 80); nor to accidents to any person while riding upon, riding in or alighting from the automobile (Tr. 55 and 63) and also provided for the giving of written notice to the company of an accident as soon as practicable.

On January 4, 1940, David Bunney sold the 1935 truck covered by the policy to Pound Motor Company, trading in the 1935 truck on a 1938 truck getting a credit of \$375 for it. On that same date, January 4, 1940, it is admitted (Tr. 181) that he took delivery of the 1938 truck; took actual physical possession of it; took it to the First National Bank at Mt. Vernon, Washington, and placed a chattel mortgage on it for \$585.56 (Tr. 181). He also on that date delivered to the Pound Motor Company the Washington State Registration Certificate on the 1935 truck (Tr. 176).

David Bunney wanted to retain the steel body on the 1935 truck and put it on the 1938 truck. This the Pound Motor Company permitted him to do (Tr. 174-175).

The next day, January 5, 1940, while attempting to move the 1935 truck it became mired in the mud and the engine ceased to run. This was thought to be due to the angle which the truck was leaning by reason of

one set of wheels being in the ditch, preventing gasoline from flowing into the carburetor.

Wilmer Bunney, a nephew of David Bunney, a boy of 13 years was playing in an adjacent yard. He was summoned by his uncle David Bunney and told to take a tomato can of gasoline and pour it into the carburetor. In order to do this he climbed up on the fender. As he poured the gasoline into the carburetor, David, who was sitting at the wheel of the truck, stepped on the starter and the resultant spark ignited the gasoline, burning Wilmer Bunney (Tr. 163, 167).

While this was going on Daniel Bunney, another of the senior Bunney Brothers, was sitting in the cab of the 1938 truck ready to help pull the 1935 truck should it get the engine started. He, however, was not actually pulling on the truck at the time of the accident (Tr. 168).

The accident happened January 5, 1940, and the insurance company, defendant herein, was not notified until February 1, 1940 (Tr. 38).

Wilmer Bunney sued David and Clarence Bunney and Pound Motor Company for his personal injuries. This was in the Superior Court of Skagit County, Washington. He obtained a judgment against all parties in the sum of \$3870 and costs of \$27.00. The defense of this suit was tendered to Associated Indemnity Corporation by Bunney Brothers but was declined. Pound Motor Company appealed the judgment to the Supreme Court of the State of Washington and the judgment as to the Pound Motor Company was reversed.

Associated Indemnity Corporation, refusing to pay

the judgment, suit was instituted against the defendant in the Superior Court of Skagit County, Washington, and was removed to the United States District Court for the Western District of Washington, Northern Division. Upon trial in the District Court before the Honorable Jeremiah Neterer and a jury a verdict was rendered against the defendant Associated Indemnity Corporation in the amount of \$4258.65 (Tr. 129).

Motion to dismiss at the close of plaintiff's case and Motion for Judgment Notwithstanding the Verdict of the Jury and Motion for New Trial were all denied and exceptions allowed (Tr. 138, 126, 127).

Whereupon this appeal followed.

ARGUMENT

The Automatic Coverage Provision

Errors 1, 2, 7, 9, 10, 14

It is the contention of appellant that whatever happened to the 1935 truck after the delivery of the 1938 truck on January 4, 1940, is immaterial. There is no question raised as to its delivery.

Witness the following:

Q (By MR. PEARSON): Handing you Defendant's Exhibits A-1, A-2 and A-3, which is, A-1, automobile purchase order, photostat copies; A-2 is the receipt for \$339.00, and the other is a chattel mortgage on the 1938 truck. I ask if you recognize those? Are those the instruments covering that deal?"

By MR. WELTS: "We object to those as immaterial and irrelevant, because *we don't question but what, on January 4th, Bunney came into ownership of the 1938 cab and chassis and drove it home.*"

By MR. PEARSON: "And took delivery on that date?"

By THE COURT: "*I think it is all admitted that the truck was taken over.*" (Tr. 180-181)

This point has been passed upon by the courts; a leading case being *Merchants Mutual Casualty Co. v. Lambert*, 90 N.H. 507, 11 Atl.(2d) 361, in which it was held that the insurance was automatically transferred under a similar provision in the policy, to the new car, and that the old car was no longer covered.

In that case which was for a declaratory judgment to determine the rights of the parties the facts were as follows:

The Merchants Mutual Casualty Co. issued its pol-

icy of insurance to defendant Lambert covering a 1930 Pierce Arrow car. The policy contained the automatic coverage provision the same as the policy involved in the instant case. The policy provided as ours does that

“(3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery,

“Between October and December 1, 1938, the 1930 Pierce-Arrow sedan was not used by the defendant because the car was worn out, out of repair, and not fit to be driven on the public highway. * * * December 1, 1938, the defendant Lambert bought a 1935 Pierce-Arrow car. * * * This was a seven passenger model like the 1930 car and was purchased for the defendant Lambert’s business to replace the 1930 car for the very same use previously made of the 1930 automobile.

“On December 1, 1938, the defendant Benjamin C Lambert, while driving the said 1935 Pierce-Arrow sedan which he had just purchased and acquired title to, was involved in an accident with a truck owned by the defendant Robert’s Express, Inc., and operated by the deceased George C. Gosselin in which accident the truck of the defendant Robert’s Express is alleged to have been damaged, and the deceased George C. Gosselin is alleged to have received personal injuries resulting in his death. At the time of the accident, December 1, 1938, the defendant, Lambert still owned the 1930 Pierce-Arrow sedan. It was in his garage with New Hampshire number plates attached and was registered in his name at the Motor Vehicle Department. * * *”

The court said, in deciding that the 1935 car was covered and that the coverage had been automatically transferred to it from the 1930 car:

“The principal argument advanced by the plaintiff is, in substance, that the finding of the trial court ‘that the 1930 Pierce-Arrow sedan was replaced by the 1935 Pierce-Arrow December 1, 1938,’ is inconsistent and irreconcilable with the other findings of the court that ‘at the time of the accident, December 1, 1938, the defendant Lambert still owned the 1930 Pierce-Arrow sedan. It was in his garage with New Hampshire number plates attached and was registered in his name at the Motor Vehicle Department.’ The position of the plaintiff is thus set forth in his brief. ‘Coverage on the 1930 car would not cease, and coverage on the 1935 car would not be effective, until the defendant had relegated the 1930 car to an unusable status by transfer of its registration and number plates to the 1935 car, so that the latter could be legally run on the highway and had paid petitioner any additional premium required because of the application of the insurance to the 1935 car.’ A similar argument was rejected by the California Court of Appeals in *Dean v. Niagara Fire Insurance Company*, 24 Cal. App.(2d) Supp. 762, 68 P.(2d) 1021, and the present argument cannot prevail because the acts enumerated therein as prerequisites to the attachment of the insurance are not required by the terms of the policy. The language of the Policy is to be construed in accordance with the principle that ‘the test is not what the insurer intended its words to mean but what a reasonable person in the position of the insured would have understood them to mean.’

Watson v. Firemans Ins. Company, 83 N.H. 200, 202, 140 Atl. 169. We think it plain that any reasonable person in the position of the defendant Lambert would have understood from the language set forth in the statement of facts, that when he purchased another automobile to replace the 1930 Pierce-Arrow, his insurance would automatically apply to the replacing automobile *as of the date of its delivery to him. The plaintiff if it had seen fit, might have inserted a provision that the insurance should not attach to the replacing car until the insured had parted with the ownership and possession of the replaced car, but in the absence of any such provision in the policy, these factors of the situation were properly regarded by the trial court as indecisive.*" (Italics ours)

"The finding of the court that the 1935 car 'was purchased for the defendant Lambert's business to replace the 1930 car for the very same use previously made of the 1930 automobile' is fully sustained by the evidence and the conclusion that 'the said policy covered the 1935 Pierce-Arrow sedan at the time of the accident as a logical conclusion'."

It would be very hard to find a case more in point than this. This instant case is even stronger for it eliminated the very thing the appellant in that case relied on; that is: that the defendant still owned the car. In our case the assured had sold and transferred title of the 1935 truck to the Pound Motor Co. He had even transferred his Motor Registration Certificate covering the 1935 truck to the Pound Motor Company.

Suppose that Bunney, after accepting delivery of

the 1938 car and while driving it had had an accident with it; would he not now be shouting lustily that the coverage had left the 1935 truck and had automatically gone to the 1938 truck?

There is no question about the fact that the 1938 truck had been bought to replace the 1935 truck. In fact Bunney had to get rid of the 1935 truck by trading it in on the 1938 truck to get enough money to buy the new truck; even taking the new truck out and putting a mortgage on it to raise the balance of the purchase price of the 1938 truck. The body of the 1935 truck belonged to him. The remainder belonged to Pound Motor Co., lock, stock and barrel.

This provision of the policy is plain and unambiguous and needs no construction.

In *Dean v. Niagara Fire Insurance Co.*, 24 Cal. App. Supp.(2d) 762, 68 P.(2d) 1021, where an automobile liability policy provided that such insurance as was afforded to each and every automobile covered thereunder and owned by the named assured should also apply during the policy period to "any other automobile ownership of which is acquired by the named assured * * * as of the delivery date to him" it was held that the evidence was sufficient to justify a finding that there had been a "delivery" of a replacement of the insured automobile. There being evidence that an injury occurred while the insured was driving a new automobile which had not at the time an accident occurred been registered in his name but was so registered subsequently. The insured was driving a new car which he had bought to replace the

old one. The policy contained the usual automatic coverage features the same as ours:

“3. The insurance afforded by this policy shall automatically terminate upon the replaced automobile *at the time of such delivery.*”

The court said:

“Still further condensing and interpolating the foregoing language, but not altering its meaning in this case, we find that the material agreement is that ‘such insurance as is afforded by this Policy to each * * * automobile * * * owned by the named Insured shall also apply * * * to any *other* automobile, ownership of which is (some-time) acquired by the Named Insured * * * as of the date (not of acquiring ownership but) of *delivery* to him,’ and that ‘If the Company does not cover all automobiles owned by the Named Insured *at the date* (not of acquiring ownership but of *such delivery*) the insurance shall be applicable only to such other automobile if it replaces an automobile described * * * and * * * shall automatically terminate upon the replaced automobile (not as of date dependent upon its transfer but) at the time of such delivery.’

“There is nothing in the policy to suggest or justify giving the word ‘delivery’ as used therein any meaning other than its ordinary one, which, in the context quoted, would signify a handing over of physical possession and control of the automobile. The fact that the Motor Vehicle Code (Stat. 1935, pp. 93, 118) provides (Sec. 186) that ‘No transfer of the title or any interest in or to a vehicle registered hereunder shall pass nor shall delivery of any said vehicle be deemed to have been made and any attempted transfer shall not be effective for any purpose

until transfer of registration is made and the department has issued a new certificate of ownership and registration card' except as therein provided, does not prevent the owner or prospective owner of an automobile from validly contracting for insurance against perils of use dependent upon possession irrespective of the status of registered ownership. *Golden Gate Motor Transport Co. v. Great American Indemnity Co.*, 6 Cal.(2d) 439, 445, 58 P.(2d) 374. Other sections of the Motor Vehicle Code mention delivery (for examples see Secs. 177-179) or transfer of possession of motor vehicles in *de facto* sense, and it is obviously in that sense that the reference is made in the policy here involved. We are satisfied that the evidence is legally sufficient to support the implied findings that prior to the accident described in the complaint the 1935 sedan had been 'delivered' to plaintiff and that it had 'replaced' in his use, as contemplated by the insurance contract involved herein, the 1934 automobile described therein. The evidence also establishes that plaintiff did acquire the legal status of registered owner of such 1935 model not later than January 10, 1936; having acquired ownership of the car, the insurance protection thereon, by the terms of the policy above quoted, attached as of the date of delivery of possession whether that date was prior or subsequent to registration of title."

Again in *Ash-Grove Lime & P. Cement Co. v. Southern Surety Co.*, 225 Mo. App. 712, 39 S.W.(2d) 434, where a "fleet" automobile liability policy provided that it "extended to cover automatically from the date of their acquisition any additional cars the assured may obtain by purchase or trade, provided

the assured shall within thirty days from the date of their acquisition make a report to the company of said cars and pay an additional premium on a pro rata basis," it was held that the policy should be construed as covering all cars owned and operated by the insured during the policy years, and to cover all new cars *immediately upon their acquisition*, and that the provision for reporting the acquisition of a new car was not for the purpose of allowing the insurer to say whether or not it was willing to extend coverage to such car, but was rather for the purpose of covering all cars owned or operated during the policy year, the court stating that at most the provision imposed only a condition subsequent.

Aetna Casualty & Surety Co. v. Chapman (Alabama) 6 Div. 768, 200 So. 425, was a case where the insured took out a policy upon a pick-up Chevrolet truck. He turned the truck over to a garage for repairs and secured from them a truck to use while repairs were being made. With this car he had an accident. He attempted to bring it under the automatic coverage provision of the policy. The Aetna brought a declaratory action to ascertain its rights and the lower court held that the policy covered. The insurance company appealed. The appellate court reversed the decision. The automatic coverage provision is the same as ours and is set out verbatim in the opinion on page 426. The Supreme Court said:

"Policies of insurance being carefully prepared by the insurer, when containing provisions reasonably subject to different construction, one favorable to the insurer and one favorable to the insured, the construction favorable to the

insured shall prevail. As sometimes stated the insured is entitled to the protection which he may reasonably expect from the terms of the policy he purchases, * * *."

"(4) In giving effect to this rule it is equally important that the contract made by the parties shall prevail, and no new contract be interpolated by construction.

"(5) Provisions clearly disclosing their real intent are not to be given a strained construction to raise doubts where none reasonably exist. No citation of authority need be made in support of these well settled principles.

"This policy does not afford indemnity against liability incurred in the operation of any and every truck in the grocery business. At the time the policy period begins its coverage is limited to the Chevrolet truck alone.

"The automatic insurance is limited to a newly acquired truck. If the insured replaced the Chevrolet truck with another owned by him when the policy was issued, the coverage would not extend to its operation. Paraphrasing the first sentence of the automatic insurance provision to meet the facts, it would read; If Mr. Chapman, the owner of the Chevrolet truck herein described, acquires ownership of a Ford truck, the protection afforded in the operation of the Chevrolet truck shall apply to his operations of the Ford truck from the date of its delivery to him, subject to the following additional conditions.

"Condition (1) admittedly has no application. (This refers to condition (1) of the automatic coverage provision Tr. 78.) It is intended to apply when this form of policy is written up to cover all trucks owned by the insured.

“Condition (2) (of the automatic coverage provision Tr. 78) is to the effect that the insurance shall apply to the Ford truck and may be classified for the commercial use defined in the policy. This clause is primarily to protect the insurer against an additional risk if the new truck be operated in a more hazardous service. If this were the sole condition, and to be read in entire disregard of the contractual provisions touching ownership, our problems would be simplified.

“Condition (3) (of the automatic coverage provision of the policy, Tr. 78) stipulates that the insurance upon the Chevrolet truck automatically terminates when replaced by the Ford truck at the date of its delivery.

“This condition is clear and unambiguous. It means the insurance shall apply to *only one truck at a given time* (Italics ours); that it does apply to the Ford truck, if at all, from the date of its delivery to the insured. Insurance on the Chevrolet is to terminate on same date. This sheds a clear light on the character of acquired ownership in the Ford necessary to bring it within the policy. There is no suggestion of a temporary shifting of coverage to the Ford, and reshifting to the Chevrolet when repaired and put back into service.

“The automatic insurance provision has the effect to write the Ford truck into the policy, and strike the Chevrolet therefrom. Thenceforth, the coverage is of the Ford until the end of the policy period, if other terms of the policy are met.”

A case from the federal courts is *Mitcham v. Traveller's Indemnity Company* (C.C.A. 4) 127 F.(2d) 27. In that case the “automatic insurance provision”

which was the same as in our case, was involved. In that case the insured, owning a Buick car purchased a Lincoln Zephyr and in an accident with the Zephyr claimed it was under the policy by virtue of the "automatic insurance provision." He had kept the Buick car but had traded in on the Zephyr a Ford car. He placed the Buick car with the motor company to be kept in storage and sold. He did not transfer title to the motor company.

The court said:

"A further statement of the facts is necessary to decide whether these contentions should be sustained. Gray purchased the Lincoln Zephyr from the Strowd Motor Company and gave in partial payment a 1938 Ford car which he received from his mother and which was covered by a policy in another company. The title to the Lincoln Zephyr was transferred to Gray and the balance of the purchase price was secured by a chattel mortgage. At first Gray stated to the Motor Company that he would put the fire, theft and collision insurance on the new car in the same company that carried his public liability insurance, *i.e.*, the insurance on the Buick car, but later he placed this insurance with another company. On the same day, January 20, 1940, Gray delivered his Buick to the Motor Company to obtain insurance thereon to protect it against fire and theft, and this was done in another company.

"Gray had been using the Buick car up until the day he acquired the Lincoln Zephyr; but as we have seen he did not trade in the Buick for the new car. He left the Buick with the Motor Company to be kept in storage and to be sold, and stated that if the car could be sold for \$500, he

would buy a Mercury car for his mother. He did not transfer the title in the car to the Motor Company. There was a lien on the car and it was arranged that the title should remain undisturbed until a purchaser was found. No purchaser was found and no one used the car prior to Gray's death on February 1, 1940.

"Upon these facts the appellant contends that the Lincoln Zephyr replaced the Buick car within the meaning of Article IV of the policy (the automatic provision clause). It is said that the purpose of the replacement clause from the company's standpoint was to make sure that the company would not insure two automobiles for one premium, and that this purpose was effectuated when Gray bought a new car and abandoned the use of the old one and put it up for sale. It is pointed out that Gray placed fire, theft and collision insurance on the new car, but made no new provision for liability insurance thereon, and it is said that this action evidenced an intent on his part to avail himself of the automatic transfer of the liability insurance covering the old car which he had abandoned to the new car which he was putting into use.

"The purpose of the insurer to cover one car is correctly set out in this argument, but the factual situation does not support the appellant's contention. The evidence supports the finding of the District Judge that the Lincoln Zephyr did not in fact replace the Buick car. Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to

demonstrate it to a customer; and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued. These circumstances distinguish the case from *Merchant's Mutual Casualty Co. v. Lambert*, 90 N.H. 507, 11 Atl.(2d) 361, 127 A.L.R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured."

Another federal case in the District court of New Jersey, *Jamison v. Phoenix Indemnity Co.*, 40 F. Supp. 87, while not strictly in point, is illuminating in holding that the automatic coverage provision applies from the date of acquisition. There the court said:

"We conclude that the provisions of this policy mean that there is automatic coverage from the date of acquisition of the replacing car only in the event that notice is given the insurer within 10 days. Plaintiff has utterly failed in this respect and accordingly, the defendant's motion is granted."

Also to the same effect *Continental Casualty Co. v. Trenner* (D.C.E.D. Penna.) 35 F. Supp. 643.

The Accident Occurred after a Change of Interest of the Assured in the Automobile Without the Written Consent of the Company.

Errors 1, 2, 8, 9, 10, 14

The policy contained the following (Tr. 80):

“This Policy does not apply * * *

“under any of the above Coverages * * * or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the company.”

As previously set out the assured David Bunney on January 4, 1940, the day before the accident sold and transferred the ownership of the 1935 truck to Pound Motor Company, for the sum of \$375 as is shown by Automobile Purchase order (Ex. A-1, Tr. 116).

Let us examine the Automobile Purchase order.

He purchased “Used Truck 1938 for \$700.” Sales tax was \$14 making a total of \$714. Upon this he was credited “Used car allowance, 1935 Ford truck Motor 1304989 \$375, leaving a balance due of \$339. Payable as follows:

“ ‘Cash payable on Delivery.’ This order is not binding until signed and accepted by an authorized member of the firm. No agreements not contained herein will be recognized unless in writing and signed by a firm member. Salesman (Signed) O. A. Pound, Purchaser (Signed) David Bunney, Address 207 So. 11th. Accepted by O. A. Pound.”

Then Bunney went to the First National Bank of Mt. Vernon and placed a mortgage on the 1938 truck (Tr. 118, 119, 120, 121) secured the money from the

bank and paid the \$339 to Pound Motor Co. Also on this date he delivered to the Pound Motor Co. his Washington State Registration Certificate (Tr. 35, 176). There remained merely the taking of the body from the 1935 truck and transferring a wooden body that he owned and which was on another truck. This wooden body had been viewed by the Pound Motor Co. and accepted by them.

A case in point is *Continental Insurance Co. v. Michaels*, from the Court of Civil Appeals of Texas, 13 S.W. 465.

In this case the insured had a policy of fire insurance issued by the Continental Insurance Co. covering a Ford automobile, which was subsequently damaged by fire. The policy contained a provision that it should be void if

“the interest of the assured in the subject of insurance be or become other than unconditional and sole ownership, or in case of transfer or termination of the interest of the assured other than by death of the insured, or in case of any change in the nature of the insurable interest of the assured in the property described in the policy, either by sale or otherwise,”

which is similar in effect to our provision which states:

“This policy does not apply; (2) * * * to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the company.” (Tr. 79)

In that case the insured had a salesman who made a sale of the car to a man named Calloway with the

understanding that if he was dissatisfied with it in a day or two he could bring it back and take another Ford sedan that they had for sale. The conditional sales contract was duly signed and filed in the auditor's office. He never came back and the car was found abandoned and burned. The court said:

“Defendant in error, on the other hand, insists that the transaction with Calloway did not affect defendant in error's interest in the property, because, he says, it passed to Calloway nothing more than an option (that is, a mere right to purchase the coupe if he chose to do so) he never exercised. We agree with defendant in error that if the right Calloway acquired was no more than an option never exercised, the stipulation was not violated; but, giving full effect to the testimony of defendant in error as a witness, referred to in the statement above, and to all other testimony adduced on his behalf, we think it nevertheless conclusively appeared that the right Calloway acquired was more than an option—that he became the owner of the coupe with a right, exercisable within a reasonable time if the condition of the car was not materially changed, to exchange it for the sedan. * * * It is clear, we think, that the interest defendant in error had in the coupe at the time it was burned was not that of an owner, but that of a mortgagee only. * * *”

Pound Motor Company became the owner of the 1935 truck on January 4, 1941, the day before the accident and Bunney had transferred his interest in the truck to them. Can it be said that Pound Motor Company had no interest in the 1935 truck after paying Bunney \$375 for it and both parties executing

the papers covering it? Clearly it was the intention of Bunney to pass all his right and title to the 1935 truck to Pound Motor Co. on January 4, 1940, else why had he delivered his Certificate of Title covering it to Pound Motor Co.? Without the Certificate of Title Pound Motor Company could not re-sell the truck.

It seems to us that it is too clear to require argument that this transfer of interest to Pound Motor Company excluded any coverage of the policy on the 1935 truck after that occurred, consequently the accident of the next day was not covered by the policy.

In *Farmers' & Merchants' Insurance Co. v. Jensen*, Supreme Court of Nebraska found in 76 N.W. 577, where fire insurance was obtained upon a dwelling and the policy contained a provision that the policy would cease to be in force "in case any change shall take place in the title * * * of the assured in the above-mentioned property," without the consent of the insurer thereto indorsed on the policy. That the property was thereafter conveyed to a third party and from the third party to the insured's wife. The court said:

"The judgment of the district court cannot stand. The provision in the policy that it should cease to be in force if a change should take place in the title of the insured without the consent of the insurer is a valid and reasonable provision. An insurance contract is a personal one between the insured and the insurer. An insurance company might be very willing to guaranty against loss or damage of his property by fire, but unwilling to furnish such a guaranty to A's vendee;

and it is for this reason that such provision as the one under consideration is inserted in fire insurance policies, so that, in case the insured shall transfer his title, the insurer may have notice thereof, and an opportunity to elect whether it will keep the policy in force in favor of the grantee or vendee. And it is because the courts recognize such a provision in an insurance policy to be a personal contract between the insurer and the insured that they hold that the violation thereof by the insured terminates the contract of insurance. *Insurance Co. v. Ketterlin*, 24 Ill. App. 188; *Langdon v. Association*, 22 Minn. 193; *Oakes v. Insurance Co.*, 131 Mass. 164; *Ehram Mach. Co. v. Phenix Ins. Co.*, 43 Neb. 554, 61 N.W. 722."

In *Keneagh v. Baker*, 284 S.W. 321, a Texas Civ. case, in passing upon the transfer of interest clause, the court said:

"Even if it had been shown that the Fifty Cent Auto Company had purchased the cars of the Driverless Ford and Dodge Company and had succeeded the insured, the bond would not automatically pass from the one to the other. The surety company had obligated itself to pay damages resulting from the negligence of the assured and not from the negligence of the vendees of the assured. There is nothing in the ordinance or the rider on the policy that so bound the surety. *It was especially provided in the bond, that 'in case the assured sells, transfers, or disposes of said automobile, all liability shall cease.'*"

Sale of Truck—Passing Title**Errors 1, 7, 9, 10, 11, 14**

There is no question but that David Bunney considered the sale of the 1935 truck a closed matter when he delivered his certificate of title to Pound Motor Co. There is no dispute about this testimony as witness the following:

Cross examination of G. A. Pound (Tr. 176):

“Q By MR. PEARSON: * * * Did Mr. Bunney deliver to you the certificate of title on the 1935 truck?

A I can't tell you the day.

By THE COURT: That is admitted in the certificate.

Q Do you know what the certificate of title is?

A Yes, sir.

Q What is it.

A It is a description of the particular truck, motor number and serial number.

Q Where does it come from?

A Olympia, Washington.

Q And the exchange of ownership * * *.

By THE COURT (Interrupting): That is all admitted.

By MR. PEARSON: That particular point isn't covered.

By THE COURT: Oh, yes. It is all admitted. The certificate speaks for itself.

By MR. PEARSON: We haven't got it here.

By THE COURT: Well, it is admitted that it was issued.

By MR. PEARSON: Very well, then you got the certificate on the 4th; that is admitted. That's all.”

The court's pre trial certificate, which the court referred to contained the following (page 1 of same Tr. 35) :

"On January 4, 1940, the Registration Certificate for the truck on which the accident happened was delivered to Pound Motor Company * * *." and in the next paragraph: "When the certificate of title was delivered * * *."

On the subject of certificates of ownership the statutes are as follows:

Rem. Rev. Stat. §6312-2: "It shall be unlawful for any person to operate any vehicle in this state under a certificate of license registration of this state without securing and having in full force and effect a certificate of ownership therefor and it shall further be unlawful for any person to sell or transfer any vehicle without complying with all the provisions of this chapter relating to certificates of ownership and license registration of vehicles * * *."

Rem. Rev. Stat. §6312-4: "(c) The reverse side of the certificate of ownership only shall contain forms for assignment and notice to the director of licenses of a transfer of the ownership or interest of the registered owner and legal owner * * *."

Rem. Rev. Stat. §6312-6: "(a) In the event of the sale or other transfer to a new registered owner of any vehicle for which a certificate of ownership and a certificate of license registration have been issued, the registered and legal owner shall endorse upon the back of their respective certificates an assignment thereof in form printed thereon, and deliver the same to the purchaser

or transferee at the time of the delivery to him of the said vehicle * * *."

It will be seen from this that when David Bunney transferred to Pound Motor Company on January 4, 1940, the registration certificate, he will be presumed to have complied with the statute and completed the assignment on its back divesting himself of all title in and to said truck. Pound Motor Company, being in the business of selling and buying motor vehicles were familiar with this angle of the law and must have required the filling of said form. At any rate no attempt was made in court to deny the full delivery of title on the registration certificate.

An attempt was made by the appellee below to show that the sale was not completed because the truck was not in a deliverable condition. It is our position that this does not make any difference; that upon the *delivery* of the 1938 truck the insurance automatically transferred to it from the 1935 truck and from that moment it made no difference what was done with the 1935 truck. The court seemed to think that the whole point at issue was when the sale of the 1935 truck was complete because the court limited the jury to that one point.

For the sake of that argument let us look into the sale of the 1935 truck. As has been related the parties agreed on the price of the 1938 truck and that the 1935 truck was traded in on the purchase for an allowance of \$375 whereupon Bunney took delivery of the 1938 truck paying the balance of \$339 completing the payment of the \$714 which was the purchase price of the 1938 truck. It will be recalled that Pound went

out and looked at the wooden bed which was to be placed on the 1935 truck in place of the steel one which Bunney wished to retain. He was satisfied with it and the deal went through. Our opponents seemed to rely on Rem. Rev. Stat. §5819-19 which says

“Unless a *different intention appears*, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

“Rule 2. When there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done.”

While we are reading the statutes on Sales we might read some in the same that the court overlooked:

Rem. Rev. Stat. §5836-42: “Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for the possession of the goods.”

Remember the purchaser had fully paid for them and had taken the registration certificate for the truck.

Rem. Rev. Stat. §5836-48: “*What constitutes acceptance*. The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him; and he does any act

in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

It seems to us that there is no need to consult the statutes for rules to aid in ascertaining the intent of the parties in this case. When the Pound Motor Company delivered the title to the 1938 truck, so that Bunney could go out to the bank immediately and mortgage it to raise the balance of the purchase price and had in their possession the Certificate of Title to the 1935 truck, which we must assume was filled out on the back thereof, assigning all the right, title and interest of Bunney in and to the 1935 truck can it be successfully argued that the title to the 1935 truck had not passed or that Pound or Bunney considered it had not passed?

But counsel says that there remained something to be done to put the truck in deliverable condition. We think not. Pound had viewed the chassis and had viewed the body and had accepted them. It only remained for to put the one on the other and either Pound or Bunney could have done that. Nothing remained to be done to either the 1935 chassis or the wooden body. If the deal depended upon delivery and the putting of the truck in deliverable condition, would Pound have delivered the 1938 truck to Bunney free and clear?

When Pound took title to the 1935 truck, in the shape of the fully assigned and endorsed Certificate of Title, he took all the delivery of the truck he con-

templated was necessary. In the last analysis if Bunney refused to transfer the wooden body on to the truck Pound could have done it himself and brought an action against Bunney for the cost of so doing.

The following is illuminating as to the intention of the parties (Tr. 174):

Direct examination of G. A. Pound:

“Q (By MR. WELTS) Now then, state whether or not that agreement you spoke of with reference to Bunney changing bodies and delivering the vehicle, or agreeing to deliver the vehicle, state whether or not that was made before or at the time that he paid for the new truck?

A It was made just before, I believe, just the day before.

Q Now, on that day that he took delivery of the new truck, did he make any request of you to delay his delivery on the 1935 truck?

A Well, not that day, but a few days after that, he did.

Q What request did he make?

A Well, he came down and said he was very busy. He was to deliver the truck on Monday. He was going to change the bodies on a Sunday and he came down Monday or Tuesday and said he had been very busy and couldn't make the change-over, but would make it in a few days and deliver the truck.

Q Did you agree to that? Did you tell him that was all right?

A Yes, sir, I did.

Q And so, then he actually delivered at a later date, subsequent to that?

A Yes, sir.”

Now, it is obvious that the parties recognized the ownership of the truck to be in Pound Motor Company else why should Bunney ask permission to delay the delivery of it a few days more? He knew it was Pound's truck and that Pound would want to sell it to someone else. If Pound had denied the request which he could have done he would in effect have said: "No, I want my truck now, you bring it in." If the deal hadn't been complete certainly Bunney never would have gone to Pound to ask *permission* to keep the truck a few days longer.

Our Supreme Court in a number of cases has passed upon the question of delivery in a sale:

In *Patrick v. Watson*, 55 Wash. 77, 104 Pac. 144, it was held that delivery of a bill of sale was the delivery of the horses involved.

In *Northern Mercantile Co. v. Schultz*, 56 Wash. 394, 105 Pac. 850, the holding was that when poles were sold acceptance constituted delivery.

In *McLeod v. Aberdeen Brewing Co.*, 194 Wash. 418, 143 Pac. 440, the court held that title passed when the property has been identified and appropriated to the contract even if not delivered.

In *Wilson v. Lamping Motors Co.*, 194 Wash. 418, 78 P.(2d) 559, the court held that title passed when Buyers Order, Certificate of Title and Bill of Sale were signed even though the possession of the car remained in the seller.

To the same effect:

Nolley v. Elliott, 50 Ga. App. 382, 178 S.E. 309;

Breakstone v. General Parts Corp., 87 Ind. App 55, 160 N.E. 47;

Reeves v. G. & G. Pumping Co. (La. App.) 151 So. 679.

In *Miles v. Pound Motor Co.*, 10 Wn.(2d) 492, 117 P.(2d) 179, which was the suit by this same plaintiff in the Superior Court of Washington for the recovery of damages for his injuries, this entire matter was before the court. In the lower court the plaintiff had secured judgment against the Bunney Brothers and Pound Motor Co. Pound Motor Co. appealed; Bunney Brothers did not. The Supreme Court of Washington reversed the judgment as to Pound Motor Co. on the grounds that the Bunneys were not the agents of the Pound Motor Co. in changing the bodies but acting for themselves as independent contractors in changing the bodies.

The court said "Title to, and immediate right of possession of the old truck and the wooden body were in appellant (Pound Motor Co.)" page 507.

The appellee here, Wilmer Bunney, by his then Guardian *ad litem*, Miles, in that case took the reverse of his position in this court. Here, at least in the court below, he loudly contended that title to the 1935 truck had not passed to the Pound Motor Co. As illustrative of his position in the Superior Court of the State of Washington, we quote from the decision in the *Miles* case (page 500):

"Respondent's theory is that the transaction relating to the sale and transfer of the two trucks and the wooden body was fully completed between the parties by the execution of the purchase order and reciprocal acceptance of, and assertion of

title to, the various properties by the respective parties; that, in law, the delivery of the old truck and the wooden body *was effected as of the places where they were then located*; that the subsequent agreement for delivery by David Bunney of the old truck and the wooden body to appellant at its place of business was separate and distinct from the original transaction; that the later agreement was one which, in law, constituted David Bunney the servant or agent of appellant in the delivery of his old truck and the wooden body; and that therefore appellant is liable for the negligence of David Bunney."

The Washington Supreme Court held that although title had passed the transferring of the body was done by the Bunneys as independent contractors or a status similar thereto. The court said (page 508):

"His status, therefore, if not exactly that of an independent contractor in the usual sense, was at any rate one which is governed by the rules applicable to that relationship, rather than by the rules applicable to master and servant, or principal and agent. Consequently, David Bunney's negligence was not imputable to appellant."

Appellee having blown hot in the state court now proceeds to blow cold in this action as witness the following from his pleading here (paragraph III of complaint, Tr. 4):

"Appeal was taken from said judgment by the other defendant, and on said appeal the Supreme Court of the State of Washington held that as a matter of law, under the transactions had between Bunney Brothers and the other defendant, *no completed sale of said motor truck had been made* to said motor company at the

time of said injury, as delivery thereof was an essential part of said sale, and no delivery had been had, and said motor truck was used and operated by David Bunney at the time of injury of said minor, on behalf of the defendants David Bunney and Clarence Bunney, doing business as against said motor company."

And to make no mistake about it witness appellee's opening statement in the court below (Tr. 157):

"Our evidence produced upon the witness stand, ladies and gentlemen of the jury, will be that Bunney *still had the ownership* of the old 1935 truck, and he continued to have that ownership under the law."

"By THE COURT: We will have the argument later!"

The *Miles* case is of course not *res judicata* here, the parties being different, but we maintain that under the same facts that case is a holding that title to the 1935 truck had passed to Pound Motor Co. That Wilmer Bunney should not be permitted to plead one cause of action in one court and that having failed to suit his purpose reverse his position and plead the contrary here. While Miles was his Guardian *ad litem* there and Bunney is his guardian *ad litem* here, his counsel Welts & Welts are the same in both cases.

The Truck at the Time of the Accident Was Not Being Operated under the Permit of the Department of Public Service.

Errors 1, 10, 13

In the Pre Trial Certificate (Tr. 34) we find that:

“It is agreed that on the 5th day of January, 1940, pursuant to notice from the W.P.A. Authorities to assemble his equipment for inspection on a W.P.A. hauling job in which the Bunneys’ including David Bunney, were to use David Bunney’s truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.”

It will be noted in this certificate that this was on January 5th, 1940, the day after he had sold the 1935 truck to the Pound Motor Company, and that the notice from the W.P.A. people was on January 5th, also. It will also be borne in mind that he had previously agreed with the Pound Motor Company before the sale that he would transfer the steel body from the 1935 chassis on to the 1938 chassis. This was prior to or on January 4. So the W.P.A. order had nothing to do with the changing of the bodies. He had sold the 1935 truck the day before and it had passed out of his and the W.P.A. service or any other service of the Bunneys. They did not intend to use it any longer after January 4. They were through with it. It was therefore no longer operated under the permit. It cannot be said that the steel body of the 1935 truck was operated under the permit. That

body belonged to the 1938 truck when it was finally put on that chassis.

Attached to the policy will be found (Tr. 56) the following endorsement:

“Associated Indemnity Corporation
110—Truckmen—Hauling under Contract.

“The named Insured having declared, as evidenced by the acceptance of this endorsement that all of the commercial automobiles which he owns will be used during the policy period exclusively for commercial purposes in the business of the W.P.A. and that the regular and frequent use of the commercial automobiles will be confined to the area within a fifty mile radius of the place of principal garaging of such automobiles as stated in the policy. It is agreed that no insurance for Bodily Injury Liability or for Property Damage Liability is afforded while any commercial automobile owned by the named Insured is used in the business of any person, firm or corporation other than the above named. This endorsement forms a part of Policy No. 253987 issued to David and Clarence Bunney by the Associated Indemnity Corporation of San Francisco, California, and is effective from Dec. 14, 1939.

ASSOCIATED INDEMNITY CORPORATION,
A. A. Anderson, Secretary.
C. W. Fellows, President.

Countersigned at
Everett, Washington
By Clark Salisbury
Duly authorized representative
Clark Investment Company.
Form 110. Uniform Standard Automobile endorsement.”

If this endorsement means anything at all, it means that when this truck, the 1935 truck, was used in any other business other than the W.P.A. it was not covered by the policy. This means that when the truck is even used in the business of Bunney Brothers it was not covered. There is no ambiguity in this endorsement; it requires no interpretation; it is couched in simple English and easily understood. While the Bunneys were changing the body, it was not in the service of the W.P.A. and consequently not under the policy. It could not be; the Bunneys having sold the truck the day before.

As to Exclusion of any Person while Entering Upon, Riding In, or Upon or Alighting From, the Automobile.

Errors 3, 13

The endorsement required by law and gotten out by the Department of Public Service and written by them has been previously mentioned herein attached to said policy contains the following:

“PROVIDED HOWEVER, That coverage shall not apply to any claims arising out of bodily injury, including death sustained by any person while riding in or upon, or entering or alighting from any automobile covered by the policy to which this endorsement is attached.” (Tr. 55, 63)

This is another indication that the coverage of this policy was intended for the general public and not to protect the people in or on or getting into or out of the vehicle.

It will be noted that this provision makes no provision that the automobile or vehicle moving but is

merely limited to "riding in or upon, or entering or alighting from" the vehicle. If the Department of Public Service wished to limit it to a moving vehicle they would have said so. They wrote this endorsement, not the insurance company.

Also this provision is not limited to adults nor does it distinguish between minors or adults; it says "any person." This would include Wilmer Bunney.

What was Wilmer Bunney doing with relation to the vehicle? This is his testimony (Tr. 163):

"A Well, I took the can from my uncle and I climbed up on the fender, and I couldn't find—well, there wasn't no place, so then I got off again, and then I kind of lay straddle of the fender and poured the gas into the carburetor.

Q You laid straddle of the fender?

A Yes.

Q Were either of your feet on the ground when you were laying straddle of the fender, pouring in the gasoline?

A One of them was; it was kind of dangling like."

And on cross examination (Tr. 164):

"Q Now, this is a V8 engine?

A Yes.

Q And the carburetor is in the middle, between the two cylinder blocks, is it not?

A Yes.

Q That is quite a ways from the edge of the truck, is it not?

A Yes.

Q It was necessary for you to draw up on the fender to get over there to pour that gasoline in?

A Yes.

Q Now, then do you remember your testimony in the Superior Court?

A Well, I remember most of it.

* * * * *

Q I will ask if your testimony there was not this:

‘Question: How did you do that?

‘Answer: He asked me to pour it in there. The first time I didn’t think it was a good idea, me sitting there or standing up there, so I laid down on there and poured it in.

‘Question: Laid down on what?

‘Answer: On the fender. It was kind of safer and I was kind of afraid of falling, jerking.

‘Question: So you laid on the fender and was pouring gasoline into the carburetor of the truck?

‘Answer: Yes.’

“That is true is it?

“A Yes.”

The coverage of the policy excludes any one while “riding in or upon, or entering or alighting from any automobile covered by the policy which this endorsement is attached.”

Now it may be urged that the coverage only covered a car in motion. That cannot be sound reasoning because one does not normally “enter upon or alight from” a car in motion. If a person is excluded that is “entering in or alighting from, or riding in or upon” a car, obviously everybody in or on the car is excluded from the policy. Can it be successfully asserted that a person sitting in the seat just before the car starts on its way or sitting in the seat at the moment

that the car stops is not excluded or that a person getting into the car is excluded and that he is not the second that he remains passive in his seat before the car starts on its way is not? Or that he is excluded from the policy while the car moves to a stop and he half rises up in his seat preparatory to alighting therefrom just before the car stops but that if he remains passive for a moment after the car stops he is under the coverage of the policy while sitting still but that the moment he moves to alight he is excluded?

One does not have to be *in* the cab of the truck to be excluded; the policy says "or upon" so if a person is upon the fender or other part of the truck such as Wilmer Bunney was he was excluded from the coverage of the policy.

In the case of *Provident Life & Accident Ins. Co. v. Nitsch* (C.C.A. 5) 123 F.(2d) 600, where the insured driving his car had come to a stop on his premises and while removing a pistol from the glove compartment of the car was accidentally shot and killed, the court said:

"The primary defense was that the automobile had come to a stop, on plaintiff's premises, the journey ended, and it could not be said that the deceased was driving or riding in the car within the policy coverage. * * *"

"Its final point that because the automobile had come to a stop, the deceased was not, within the policy coverage, riding in it is equally without merit. It would be difficult, we think to conceive of a case more clearly that of riding in an automobile than the one at bar, unless indeed, the coverage must be considered as clipped at

both the starting and the arriving end of a journey. So that on the one hand, it does not take effect until the car starts rolling. And on the other, it becomes ineffective the moment motion ceases, though in the first case, the insured has gotten into the car which is just about to move and in the second case the insured has not gotten out of the car which has just come to a stop.

“If this construction were right, insured would not be covered while getting into or out of the car for the purpose of riding and the policy would be required to read as though, in lieu of the words used, there appeared in it, the words ‘while the car is in motion.’ Appellant’s theory, carried to its logical conclusion, would require an occupant of an automobile who desired coverage to sit poised for instant flight from the car as soon as motion ceased, and might also involve some quite close distinctions as to the precise point when the motion ceased. This is an unreasonable construction which finds itself supported neither by reason nor by the authorities appellant cites * * *.” Citing Blashfield, *Cyclopedia of Automobile Law and Practice*, Sec. 4126, page 474.

But the courts have passed upon “riding” in a car that is standing still and have held that it makes no difference whether the car is moving or stopped.

In *Johnson v. Federal Life Insurance Co.*, a North Dakota case found in 234 N.W. 661, the assured Johnson was driving with another man in a coupe. They were found in the morning in a mudhole with the water up to the running board. The motor was running and both the occupants were dead. The car was equipped with a heater which was out of order and

the deaths were caused by the inhalation of carbon monoxide gas. The night was chilly and the two men were clothed in overcoats, mittens and caps. The car was out of gear and as has been stated the motor was running independently.

It was argued that the men were stalled and chose to spend the night in the car comfortably while waiting for daylight. Also from the fact that they were dead from carbon monoxide showed that the car had not been driven at the time as it was highly improbable that the car could accumulate enough gas to cause death if the car was being driven or in motion. The court said:

“It will be noted that the contentions of the appellants rest upon a close literal construction of the policy. It seems to be *assumed that one cannot be riding* in a car unless the car is in motion and that the instant he stops he ceases to ride. The argument negatives any connotation of the word “riding” which would include the mere sustaining of the insured during a period when the car might be stopped on account of some obstacle interfering with the progress of the journey. We are of the opinion that under a reasonable construction the language of the policy conveys such a meaning. It is intended, as we read it, to give double indemnity to an assured on account of any loss resulting from personal bodily injury caused by the happening of a purely accidental event while the insured is subject to a hazard incident to riding in or driving a privately owned automobile. To exclude the inhalation of carbon monoxide gas during a period when the car is stalled in a mudhole on the theory that motion had ceased would be

not merely to adopt a narrow meaning of the language of the contract, but to actually deprive the words used of a portion of their ordinary meaning. The occupants of a car while it is stalled in a mudhole, practically during a time when means of escape in comfort may well be lacking, *is still riding in the car in quite the same sense as a passenger upon a steamship at anchor may be riding the waves*. It has been held that injuries sustained by one in leaping from an automobile in the hope of avoiding impending dangers falls within such a provision (see *Wright v. Aetna Ins. Co.* (C.C.A.) 10 F.(2d) 281, 46 A.L.R. 225) and that one injured in getting out of his car by stepping upon a brick or some other object on the ground was within such a provision (*Southern Surety Co. v. Davidson* (Tex. Civ. App.) 280 S.W. 336). With reference to the contention that the coverage stopped when the car ceased to move, the court in the latter case said (page 337 of 280 S.W.): 'It is true that the automobile that appellee was driving had ceased to move when he undertook to go therefrom, but the terms of the policy did not limit appellee's liability to an injury only when the automobile was in actual motion. The policy is to be most strongly construed against appellant and had it been the intention to limit the benefit to the insured only while he was moving in his automobile, it must be presumed that it would have been so stated in the contract. See, as further lending to support our conclusion, May on Insurance. (2d Ed.) Sec. 534; Couch Cyc. of Ins. Law, Vol. 5, Sec. 1151j.'" (*Italics in these cases ours*)

This case seems to be very much in point event to the fact that the car was stalled in a mudhole such as

the Bunney truck was at the time of the accident in the instant case.

An interpretation of the word "riding" in the endorsement under consideration must be given a meaning to effectuate the intention of the parties when the endorsement was added. The object to be attained was the protection of the general public from the operations of this truck and it seems to be clearly also to have been the purpose not to protect any one in, on or getting on or off the truck. In other words any one concerned with the operation or running of the truck or in any manner connected with the truck, either as a passenger, repairman, mechanic or any one else "in or on" the truck.

This angle is covered by two endorsements attached to the policy. One the Department of Public Works Endorsement, which is a compulsory endorsement, and another so called "Passenger Hazard Exclusion Endorsement," which has the same wording as the Department of Public Works Endorsement.

Another strong case on "riding" was the case of *Dorsey v. Fidelity Union Cas. Co.* (Tex. Civ. App.) 52 S.W.(2d) 775. The assured had been hunting and after finishing had entered his automobile and sat behind the wheel while his companion emptied the shotgun of shells. The car was not running. The gun accidentally was discharged and the shot killed the insured. The court held that the insured was operating or riding in the car.

In *Southern Surety Co. v. Davidson* (Tex. Civ. App.) 280 S.W. 336, the assured had stopped his car and was alighting from the car. He accidentally step-

ped on a brick and sprained his ankle. Held that he was not limited to the policy while the car was in actual motion and that he was "operating" the car at the time of the accident. The case quotes from 2 May on Insurance, Sec. 524 which says: "A person may be said to be traveling in a carriage while alighting therefrom, until he had completely disconnected himself and landed. The case also quotes from 5 Joyce on Insurance, page 4992, Sec. 2874, which says:

"Even though the journey may have terminated by the conveyance in which the assured is traveling having reached assured's destination on that line of traveling, yet the insured is protected in doing the necessary act of leaving the conveyance and until he has safely landed, for until then he is still a traveler by that particular conveyance; and if he sustains an accidental injury at the time of leaving or alighting from such conveyance, such accident arises directly out of an act immediately connected with his being a passenger."

In passing on the similar phase of "operation" of a car, the court in *Stroud v. Board of Water Commissioners of City of Hartford* (Supreme Court of Errors of Connecticut) 97 Atl. 336, said:

"The word 'Operation' cannot be limited as the plaintiff claims it should be, to a state of motion controlled by the mechanism of the car. It is self evident that an injury may be received after the operator has brought his car to a stop, and may yet be received by reason of its operation. The word 'Operation' therefore must include such stops as motor vehicles ordinarily make in the course of their operation."

Obviously, one need not be in the cab of the truck to be riding. In *Stewart v. North American Accident Insurance Co.* (Mo. App.) 33 S.W.(2d) 1005, it was held that one on the running board was riding within the provisions of a policy which provided that the coverage protected against injury in the wrecking of the automobile "in which the assured is riding." He fell from the running board and was killed.

Similar cases are:

Kennedy v. Maryland Casualty Co., 26 F. (2d) 501;

Fidelity Union Casualty Co. v. Posey, 178 Ark. 1017, 13 S.W.(2d) 32.

Exclusion of Employees While Engaged in the Business of the Insured or in the Operation, Maintenance or Repair of the Automobile.

Errors 1, 5, 6, 12, 14

The question of what constitutes "operating" has been discussed and cases cited and quoted in the previous assignment of error covering "Exclusion of any person while entering upon, riding in, or upon or alighting from the automobile," so we will not repeat the citation or quotations here.

As has been pointed out the policy contained an exclusion (Tr. 80) on page 3, paragraph 5 of the policy as follows:

"This policy does not apply * * * under Coverage A, nor under Insuring Agreement II, to bodily injury to or death of any employee of any insured while engaged in the business of any insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which any in-

sured may be held liable under any workmen's compensation law."

And also in the Department of Public Service Endorsement attached to the Policy (Tr. 65), paragraph 6 thereof as follows:

"This endorsement shall not be construed as covering the legal liability of the insured for injuries to or death of employees of the said insured engaged in the *operation or maintenance* of any automobile or any other employee of the insured arising out of or in the usual course of the trade, business, profession or occupation of the insured."

It will be recalled that this boy was summoned by his uncle and directed to take a tomato can full of gasoline and get up on the car and pour it into the carburetor when he was hurt.

If he was not engaged in the operation or maintenance of the truck at the time it would be difficult to classify him in any other. They were trying to get the motor running and to get the truck running. What was their whole purpose in their occupation? The only answer possible is that they were operating the truck and if the boy was an employee then he was excluded. If he was not operating or maintaining the truck then certainly he came under the remainder of the paragraph: "arising out of or in the usual course of the trade, business, profession or occupation of the insured."

Taking the policy and the endorsements by its four corners it will be seen that the protection given by the Department of Public Works and the policy and en-

dorsements, was to the general public and not persons in the immediate employ or control of the insured.

It cannot be said that this endorsement was the work of the insurance company and should be most strongly construed against it because this endorsement was required by the Department of Public Service and dictated by them. Therefore construction of any ambiguity should be construed against the Department of Public Service and in favor of the Insurance Company.

Was the boy an employe within the meaning of the policy and the endorsement? It seems to us that he should be so held. It could not be considered that he was a member of the general public for whose protection the policy and endorsements were intended to protect. He was under the immediate control and dominance of Bunney Brothers and whether or not there was any payment for the service is immaterial.

But the court said that this boy was incapable of entering into a contract of labor. Contracts of minors are not void but merely voidable.

On the subject of the contracts of minors we have only to turn to the statute in force at the time:

Rem. Rev. Stat. §5829: "A minor is bound, not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money and property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority."

So Wilmer Bunney could enter into the employ-

ment of the uncle even for a short period. If he was not an employee he could not be in any other category. He was not a volunteer; the uncle had to call him twice before he would come (Tr. 165, testimony of Wilmer Bunney). Also opening statement of appellee's counsel (Tr. 147, 148):

“ * * * David Bunney then called to this child, who was playing basketball in the yard adjoining—he was a fifteen (13) year old boy, in school, then—to come over to the truck to pour some gasoline into the carburetor. He called him the second time to come over, and the boy came over then, and he handed him a tomato can and told the child to pour the gasoline into the open carburetor.”

This we maintain was not the act of a volunteer but a direct employment.

Having shown that Wilmer Bunney was capable of entering into a contract of employment the question remains: was he an employee within the meaning of the endorsement?

Without encumbering this already too long brief with many citations on the question of Master and Servant we will quote only from 18 R.C.L. page 490, under the head of Master and Servant:

“ * * * The essential elements are that the master shall have control and direction not only of the employment to which the contract relates, but of all of its details, and shall have the right to employ at will and for proper cause discharge those who serve him. If these elements are wanting, the relation does not exist.” Citing *Baltimore Boot, etc., Co. v. Jamar*, 93 Md. 404, 49 Atl. 847, 86 A.S.R. 428; *McColligan v. Penn. R.*

R. 214 Pa. St. 229, 63 Atl. 792, 112 A.S.R. 739,
6 L.R.A.(N.S.) 544. Note 37 L.R.A. 40.

In this case Bunney certainly directed the entire operations. He ordered Wilmer around on the job and commanded him peremptorily to come and do the job. He could just as peremptorily have discharged him from the job. Can the length of time have anything to do with the matter of employment? Suppose the men worked all afternoon on this job of trying to start the engine and had Wilmer around there helping them in the manner he was. Would it then be denied that he was working for his uncles?

We maintain that he was an employe and came under the exclusions. All of which goes to show that Wilmer Bunney was in the general class of workmen and others who were not intended to be covered under the terms of the policy and endorsements.

It seems to us that nothing could be plainer that that it was the intention of the Department of Public Service to protect the general public; those people outside of the truck or vehicle and to exclude the coverage from those in the truck or having anything to do with its operation, control or maintenance; or riding in, or alighting from said truck. This is repeated in so many ways that one cannot escape the conclusion that this was their intention.

The Court Erred in Removing from the Jury the Question of Delayed Notice.

Error 4

It is conceded that this accident happened January 5, 1940, and was not reported to the insurance company until February 1, 1940.

The policy provides as follows:

“9. NOTICE OF ACCIDENT, CLAIM OR SUIT. Upon the occurrence of an accident, written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place, and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the company every demand, notice, summons, or other process received by him or his representative.”

No excuse was given by the assured as to why notice was not immediately given to the company. It was probably because the assured did not feel that the company was involved and that it did not cover the truck at the time of the accident. The court instructed the jury as follows on this point (Tr. 189):

“The claim that the defendant did not give timely notice of the accident to the defendant insurance company is not available as a defense in this case, as a matter of law. From the disclosures made on the pretrial hearing, the notice was sufficient, and timely given, and could not be urged in this suit as against this boy and no prejudice did result to the defendant company in

making the investigation of all witnesses who were familiar with the facts and all of them were then available.”

Appellee contends and the court in the Pre-Trial certificate (Tr. 38 and 39) found that because the attorney for the appellee, Mr. Welts, took the insurance investigator to the home of the plaintiff's mother and put him in touch with Daniel Bunney and David Bunney, our insured, that no prejudice resulted from the delayed notice. Remember this was approximately a month after the accident.

It is one thing to interview witnesses immediately after the accident when their views are fresh and uninfluenced by conversations with other friends and advisors and get their statements down in writing and another thing altogether to interview them a month after the accident when all parties have gotten together, considered the legal effect of their statements and agreed on all details of the matter. Self interest rises to the surface and overrides facts that might make dead against the maker of the statement. The mere fact that the insurance company had no evidence to offer that it was prejudiced should not have kept the matter from the jury. The fact that a month after the accident the attorney for the injured party should have taken the investigator around to two parties and our own insured and gotten their stale stories of the accident and transfer of the truck should not weigh against our contract rights. The passage of time beclouds the memory and who can say that if their stories had been taken right after the accident they might have disclosed a different state of

facts from which a different legal conclusion might have been drawn.

Bear in mind that the appellee had no defense to offer as to why the insured had not notified the insurance company of the accident. Not the slightest excuse for not doing so. This being so how could the court withdraw the matter from the jury. This was a jury trial and the jurors were the judges of the facts and the defendant should have had the right to have the jury pass on the matter of delayed notice. We were not permitted to even argue it to the jury.

In *Dowell, Inc. v. United Pacific Cas. Co.*, 191 Wash. 682, the court said in passing on a provision for immediate notice:

“A provision for ‘immediate notice’ contained in an insurance policy is not to be disregarded. Its obvious purpose is to enable the insurer to inform itself promptly concerning a given accident, so that it may investigate the circumstances, prepare for a defense, if necessary, and be advised whether it is prudent to settle any claim arising therefrom. The term ‘immediate notice,’ however, is to be given a reasonable application under the facts and circumstances of each particular case.”

In *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, quoting from page 137, the court said:

“The evidence shows that the respondent caused notice to be sent to the appellant on the 12th day after the death of her husband. Until the death of her husband she was not a claimant under the terms of the policy. This was not an unreasonable delay, and therefore *it was the duty*

of the court to submit the question of reasonable time to the jury, which was properly done.” (Italics ours)

If the court having held in this jurisdiction that a delay of only twelve days was properly submitted to the jury how can it be denied that the question should not have been submitted to the jury in the case at bar when the delay was 26 days?

In this same case (*Horsfall v. Pacific Mutual Life Ins. Co., supra*) the court said, page 137:

“Immediate notice ordinarily means within a reasonable time and with due diligence under the circumstances of the particular case, *of which the jury are ordinarily the judges.* 2 May, Insurance (4th ed.) Sec. 462, *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429 (67 Pac. 989); *Western Commercial Travelers Assn. v. Smith*, 85 Fed. 401 (40 L.R.A. 653).”

Because we have no evidence to offer on the subject except to show the notice was not given promptly should not prevent the question of reasonable notice from going to the jury. In view of the fact that the appellee had not given a syllable of testimony as to any reason or cause for the delay, might have called for an instruction that the insured had forfeited his rights under the policy. He could not urge, as many have, that the accident was so minor that he thought nothing would come out of it; or that he didn't read the policy; or that he phoned the agent, or gave verbal notice; or that the company had waived the notice; the last resort of desperate claimants. The rights of the plaintiff cannot rise any higher than that of the insured.

Koontz v. General Casualty Co., 162 Wash. 77, 297 Pac. 1081, wherein the court said:

"The respondent, of course, has no higher rights in the policy than has Tefft, and if Tefft cannot recover, he cannot."

Also *Baxter v. Central West Casualty Co.*, 186 Wash. 459, 58 P.(2d) 835, wherein the court said:

"The rights of Mr. and Mrs. Baxter, the plaintiffs in the first action, are no greater than the rights of J. W. Sparks, the insured, relative to the policy of insurance. If Sparks could not have recovered upon the judgment against himself and Mrs. Sparks, had they paid the same, neither can the respondents Mr. and Mrs. Baxter."

But the court in the instant case said because we had no evidence to offer he would withdraw the matter from the jury. What evidence could we offer? How could we show that we would be prejudiced except to appeal to the jury by argument? How could we show what the statements of these witnesses would have been had we been able to get them before they had the benefit of counsel and the passage of time? We submit that the court was in error in withdrawing this matter from the jury.

CONCLUSION

In conclusion we earnestly submit that the judgment of the court below should be reversed, and the action dismissed for the following reasons:

1. Under the automatic coverage provision, there was no coverage on the 1935 truck, the 1938 truck having been purchased and delivery accepted the day before the accident and because there was a change

of interest in the ownership of the 1935 truck, the insured having sold it the day before the accident.

2. The claimant was entering upon, riding in or alighting from the truck at the time of the accident and is excluded from the policy.

3. The claimant was an employe and was excluded from the provisions of the policy.

4. The truck was not being operated under the Public Service Permit at the time of the accident.

5. The claimant was engaged in the operation, maintenance or repair of the truck at the time of the accident and was excluded.

6. The claimant was under the age of 14 years and was assisting in the operation of the truck at the time and was therefore excluded.

7. The insured failed to give reasonable notice to the insurance company of the accident; the accident happening January 5th, 1941, and no notice given until February 1, 1941.

That in any event a new trial should be granted appellant because of the errors set forth herein.

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IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY COR-
PORATION, a corporation,
Appellant,

vs.

LAWRENCE P. BUNNEY, as Guar-
dian of WILMER BUNNEY, a
minor,
Appellee.

Upon Appeal from the District Court of the
United States for the Western District
of Washington, Northern Division

APPELLEE'S BRIEF

WELTS & WELTS,
HENDERSON & McBEE,
Attorneys for Appellee.

Office and P. O. Address:
Mount Vernon, Washington.

MAR 22 1943

PAUL P. O'BRIEN,
CLERK

TABLE OF CONTENTS

| | Page |
|---|---------|
| Argument | 8 |
| Automatic Coverage Provision..... | 8 - 18 |
| Conclusion | 42 |
| Delayed Notice | 26 - 34 |
| Entering upon, Riding in, etc. Truck..... | 20 - 22 |
| Exclusion of Employees..... | 23 - 26 |
| Exclusion of Passenger..... | 20 - 22 |
| Jurisdiction | 1 |
| Miles vs. Bunney | 40 - 42 |
| Sale of Truck, Passing Title | 35 - 40 |
| Statement of Case (Supplemental)..... | 1 - 5 |
| Summary | 6 - 8 |
| Transfer of Interest in Vehicle | 34 - 35 |
| Truck Not Operated Under Permit | 18 - 20 |

TABLE OF CASES

| | Page |
|--|------|
| Aetna Cas. & Survey Co. v. Chapman, (Ala.) 200 S.W. 425 | 14 |
| American Fidelity & Cas. Co. v. Big Four Taxi Co., 163 S.E. 40 | 29 |
| American Fidelity & Cas. Co. v. Williams, (Tex.) 34 S.W. (2d) 396 | 28 |
| American Film Co. v. Moye, (C.C.A. 9) 267 Fed. 419, 421 | 39 |
| Arms v. Faszholz, 32 S.W. (2d) 781 | 21 |
| Ash-Grove Lime & P. Cement Co. v. Southern Surety Co., (Mo.) 39 S.W. (2d) 434..... | 14 |
| Ayres v. Harleysville Cas. Co., 2 S.E. (2d) 303..... | 26 |
| Baxter v. Central West Cas. Co., (Wash.) 58 Pac. (2d) 835 | 41 |
| Bommarito v. North American Accident Ins. Co., 295 N.Y.S. 624 | 20 |
| Boyle v. Manufacturers Liab. Ins. Co., 115 Atl. 383 | 28 |
| Braley Motor Co. v. Northwest Cas. Co., (Wash.) 49 Pac. (2d) 911 | 23 |

| | Page |
|--|------|
| Brammer v. Lappenbusch, (Wash.) 30 Pac. (2d) 947 | 34 |
| Brodsky v. Motorists Cas. Ins. Co., 170 Atl. 243, 176 Atl. 143 | 27 |
| Butler v. Supreme Court of Foresters, (Wash.) 101 Pac. 481 | 41 |
| Cerex Co. v. Peterson, (Iowa) 212 N.W. 890..... | 40 |
| Christ v. Chicago, Northwestern R. Co. (Minn.) 224 N.W. 247..... | 21 |
| Columbia Agricultural Co. v. Seid Pak Sing (C.C. A. 9) 267 Fed. 1..... | 39 |
| Commercial Credit Co. v. McNelly (Dela.) 171 Atl. 446 | 40 |
| Continental Cas. Co. v. Shankel, 88 Fed. (2d) 819 | 24 |
| Continental Ins. Co. v. Michaels, 13 S.W. (2d) 465 | 34 |
| Dahline v. Seattle, (Wash.) 5 Pac. (2d) 1010..... | 22 |
| Dean v. Niagara Fire Ins. Co. (Cal.) 68 Pac. (2d) 1021 | 14 |
| Dewhirst v. Conn. Co., 114 Atl. 100..... | 26 |
| Dowell Inc. v. United Pac. Cas. Co., (Wash.) 72 Pac. (2d) 296 | 30 |
| Duncan v. A.T. & S.F. Ry. Co., et al, (C.C.A.9) 72 Fed. 808, 810 | 39 |
| Eastern & Western Lbr. Co. v. Rayley, (C.C.A.9) 157 Fed. 532, 533 | 39 |
| Employers Cas. Co. v. Underwood, (Okla.) 286 Pac. 7 | 25 |
| Farmers & Merchants Ins. Co. v. Jensen, 76 N.W. 577 | 35 |
| Finkelberg v. Continental Cas. Co., (Wash.) 219 Pac. 12 | 31 |
| Gillingham v. Phelps, (Wash.) 119 Pac. (2d) 914 | 39 |
| Gilmore v. McBride, (C.C.A.9) 156 Fed. 464, 465 | 39 |
| Gregg v. Northern Pac. R. Co., (Wash.) 94 Pac. 911 | 21 |
| Hartford v. Stout, (Wash.) 172 Pac. 1168..... | 40 |
| Hiscock v. Phinney, (Wash.) 142 Pac. 461..... | 32 |

TABLE OF CASES

v

| | Page |
|--|--------|
| Horsfall v. Pacific Mut. Life Ins. Co., (Wash.) 72 | 30 |
| Pac. 1028 | 30 |
| Jamison v. Phoenix Ind. Co., 40 Fed. Supp. 87.... | 14, 15 |
| Janney v. Bell, 111 Fed. (2d) 103..... | 40 |
| Junkin v. Anderson, (Wash.) 120 Pac. (2d) 548.... | 40 |
| Keneagh v. Baker, 284 S.W. 321..... | 35 |
| Kimball v. Donohue, (Wash.) 214 Pac. 1045, 217 | |
| Pac. 37 | 40 |
| Louisville, Evansville & St. Louis R. Co. v. Wilson, | |
| 138 U.S. 501, 34 L. Ed. 1023..... | 24 |
| Lydon v. Exchange Nat'l Bank, (Wash.) 248 Pac. | |
| 806 | 32 |
| McIlwaine v. Tacoma R. & Power Co., (Wash.) 139 | |
| Pac. 193 | 22 |
| Merchants Cas. Co. v. Lambert, (N.H.) 11 Atl. | |
| (2d) 361 | 14 |
| Myers v. Brown, et al, (C.C.A.9) 102 Fed. 250..... | 38 |
| Miles v. Bunney, (Wash.) 117 Pac. (2d) 179..... | 42 |
| Mitcham v. Travelers Ind. Co., (C.C.A. 4) 127 Fed. | |
| (2d) 27..... | 11, 15 |
| Narcross v. B. L. Roberts Co., 132 N.E. 399..... | 24 |
| National Bank v. Fidelity & Cas. Co., 125 Fed. | |
| (2d) 920 | 24 |
| Neeley v. Bock, (Wash.) 50 Pac. (2d) 524..... | 32 |
| Ogilvie v. Hong, (Wash.) 27 Pac. (2d) 141..... | 33 |
| O'Tier v. Sell, 169 N.E. 624..... | 25 |
| Ott v. American Fid. & Cas. Co., 159 S.E. 635..... | 28 |
| Pennsylvania Cas. Co. v. Whiteway, (C.C.A.9) 210 | |
| Fed. 782, 784 | 39 |
| Schanen v. Industrial Commission, (Wis.) 228 | |
| N.W. 520 | 24 |
| Shepard v. Findley, (Iowa) 214 N.W. 676..... | 40 |
| Sills v. Sorenson, (Wash.) 73 Pac. (2d) 798..... | 23 |
| Sladjoe v. National Cas. Co., (Wash.) 164 Pac. 203 | |
| Southwestern Brewery & Ice Co. v. Schmidt, 226 | |
| U.S. 162, 33 S. Ct. 68, 57 L. Ed. 170, 173..... | 38 |

| | Page |
|---|------|
| State v. Rector, 40 S.W. (2d) 639..... | 21 |
| State Farm Mut. Acc. Ins. Co. v. Coughran, 92 Fed. (2d) 239 | 26 |
| Stoil, et al, v. Holland, et al, (C.C.A.9) 3 Fed. (2d) 776 | 38 |
| Strickland v. Davis, 128 So. 233..... | 21 |
| Thompson v. State Automobile Mut. Ins. Co., (W. Va.) 11 S.E. (2d) 849..... | 12 |
| Underwood v. State, (Ala.) 132 So. 606..... | 25 |
| Villa v. United Elec. Rys., 155 Atl. 366..... | 21 |
| Witherstine v. Employers Liab. Ass. Corp., 139 N.E. 229 | 26 |
| Whitney v. Employers Ind. Corp., (Iowa) 202 N.W. 236 | 41 |
| Zolawenski v. Aberdeen, (Wash.) 129 Pac. 1090..... | 32 |

TEXTBOOKS

| | |
|--|--------|
| 6 Blashfield, Sec. 3891, page 305..... | 18 |
| 6 Blashfield, Sec. 3892, page 305-6 | 18 |
| 6 Blashfield, Sec. 3922, page 316..... | 27 |
| 6 Blashfield, Sec. 3963, page 346 | 17, 18 |
| 6 Blashfield, Sec. 3995, page 366..... | 21 |
| 6 Blashfield, Sec. 4076, page 442..... | 28 |
| 6 Blashfield, Sec. 4079, page 446..... | 28 |
| 6 Blashfield, Sec. 4080, page 450-1-2..... | 28, 29 |
| 6 Blashfield, (Supplement), Sec. 4076, page 184..... | 41 |
| 10 Am. Jur., Sec. 953, page 26..... | 22 |
| 47 C.J. 1374..... | 21 |
| 15 R.C.L. Sec. 481, page 1008..... | 41 |
| O'Brien Manual of Federal Appellate Procedure, 3rd Ed., p. 188..... | 38 |

STATUTES

| | |
|---|----|
| Rem. Rev. Stat. of Washington, Sec. 5836-18..... | 36 |
| Rem. Rev. Stat. of Washington, Sec. 5836-19..... | 36 |
| Rem. Rev. Stat. of Washington, Sec. 6382-16..... | 2 |
| 1935 Session Laws of State of Washington, Chap. 184, Sec. 16 | 2 |

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY COR-
PORATION, a corporation,

Appellant,

vs.

LAWRENCE P. BUNNEY, as Guar-
dian of WILMER BUNNEY, a
minor,

Appellee.

No. 10349

Upon Appeal from the District Court of the
United States for the Western District
of Washington, Northern Division

APPELLEE'S BRIEF

JURISDICTION

We are not questioning this court's jurisdiction.

STATEMENT OF THE CASE

The insurance policy involved here was issued and filed with the Department of Public Service of the State of Washington, to comply with mandatory provisions of statute law of that State and the departmental regulations formulated thereunder, as a prerequisite for Bunney to obtain his State Public Service permit whereunder he had been using the 1935 one and one-half ton dump truck in W. P. A. hauling.

(Plaintiff's Exhibit No. 1, Tr. 44; Plaintiff's Exhibit No. 2, Tr. 97.)

The statutory provision applicable thereto is found in Rem. Rev. Statutes Sec. 6382-16 or in the 1935 Session Laws of the State of Washington, Chapter 184, Section 16. It reads as follows:

"Sec. 16. The department shall in the granting of permits to 'common carriers' and 'contract carriers' under this act require such carriers to either procure and file liability and property damage insurance from a company licensed to write such insurance in the State of Washington, or deposit such security, for such limits of liability and upon such terms and conditions as the department shall determine to be necessary for the reasonable protection of the public against damage and injury for which such carrier may be liable by reason of the operation of any motor vehicle.

"In fixing the amount of said insurance policy or policies, or deposit of security, the department shall give due consideration to the character and amount of traffic and the number of persons affected and the degree of danger which the proposed operation involves."

In compliance with the statutory provision and departmental rules, this policy bore a compulsory insurance endorsement, (Tr. 59), making the coverage of the policy applicable to any automobile used by the named insured at any time during the policy period under his State permit, even if he did not own the vehicle so used.

The Department of Public Service endorsement (Tr. 62) unqualifiedly required the insurance company to pay any final judgment for bodily injury within the limits of coverage, which are not here in question, caused by any and all motor vehicles covered by the policy and endorsement and operated by the insured pursuant to his permit. The only exception is one riding in or upon, or entering in or alighting from the motor vehicle. It made the coverage applicable not only to the vehicle named in the policy but "any additional, emergency or substituted motor vehicle for a period of ten days from the date of beginning of use of such equipment" unless the same be covered by other insurance. (Tr. 64). It further provided that the policy "shall not expire nor shall cancellation take effect until after fifteen (15) days notice in writing by the company shall have first been given to the department." (Tr. 65). It also provided that "nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the insured, shall relieve the company from liability hereunder or from the payment of such judgment." (Tr. 63) This policy, with its endorsements, remained in full force and effect unvaried and on file with the Department at the time the injury in question occurred. (Tr. 96)

The injury to the child occurred on January 5th.

A few days before, Bunney had been negotiating with Pound Motor Company to purchase from it a 1938 truck consisting solely of a chassis and cab, with no box or bed of any kind thereon. (Tr. 172; 178). Pound in turn contemplated purchasing the 1935 truck from Bunney but not the steel bed thereon. Bunney was to keep that equipment, and intended to put it on the 1938 chassis and substitute it therefor on his dump-trucking work with W. P. A. Pound was to acquire a wooden truck body, then upon a third truck owned by Bunney Brothers. In determining how much he would pay therefor, Pound looked at this wooden truck body situated upon the third truck. (Tr. 176-7)

On January 4th, Bunney bought and took delivery of the 1938 chassis and cab. As a prerequisite to Pound becoming the legal owner of the 1935 truck with wooden bed, Bunney had to put this truck into deliverable shape and deliver it to Pound's place of business. This required that the steel bed be removed therefrom and that the wooden bed be taken from the truck, of which it was a part, and placed upon the 1935 vehicle, and that the vehicle be driven to Pound's garage and turned over to him, completing delivery. (Tr. 171-7; 177-81)

On January 5th, the day of the accident, pursuant to notice from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling

job in which Bunney had been using his truck under his dump-truck operation permit, he was in the act of moving the 1935 truck to take the steel body therefrom and put it on the 1938 chassis and put on the wooden body and deliver the 1935 truck to Pound when the child was hurt. (Court's certification of statement of facts on Pre-Trial Hearing, Tr. 37). After he moved the 1935 truck a few feet, one wheel bogged down in the street so the gas would not feed. He called the child, Wilmer Bunney, who was playing basketball in an adjoining yard. After the second call, the child came. Bunney gave him a tomato can of gasoline, removed the flame arrester from the truck carburetor, and the child leaned across the fender of the truck, with one foot on the ground or dangling, and poured the gasoline into the truck carburetor. (Tr. 38; Tr. 164) The one sitting at the wheel of that truck in the driver's seat, stepped on the starter of the 1935 truck; the motor backfired; the gasoline ignited or exploded and the child was burned. (Tr. 167)

Judgment was recovered against Bunney for that injury. This suit was brought on that judgment, removed from the State court to the United States District Court, and there tried before the Honorable Jeremiah Neterer and a jury. From judgment entered upon the jury verdict in the sum of \$3780.00 and costs, this appeal was taken.

SUMMARY

The insurance did not shift from the truck by which the child was injured because the automatic clause did not become operative prior thereto. Bunney still owned the 1935 truck as found by the jury, and the new equipment was a bare cab and chassis. It had not legally or actually replaced the 1935 truck and could not be classified as capable of conducting dump-truck operations without a bed or dump box being placed thereon. That bed was still on the 1935 vehicle.

The Public Service and Compulsory Insurance Endorsements required by State law and departmental regulations foreclose this question.

Under the sale and purchase agreement made between Bunney and Pound for the 1935 truck, legal title had not passed to Pound but was in Bunney because the property was to be put in deliverable shape by Bunney. This required that he remove the steel bed therefrom which he was to retain and place upon the new 1938 chassis. It also required that he take the wooden bed from the third truck, place it on the 1935 truck and deliver the equipment to Pound's place of business before it became Pound's property. The Uniform Sales Act of Washington, and decisions of the Supreme Court of that State, make

the question of when the parties intended legal title to pass a factual one for determination by a jury, and the jury found title had not passed. Transfer of the registration certificate does not necessarily pass legal title. It is only evidence of intention to be considered with all other evidence in determining the ultimate fact.

As a matter of law, the child was not within the Passenger Hazard Exclusion. He was not going to be conveyed anywhere.

He was not an employee. One performing a casual, gratuitous service is not an employee within the meaning of such an exclusion clause. He was not operating the vehicle. He had nothing to do with the mechanism of the truck, actively or by direction. He was pouring a tomato can of gasoline into the carburetor at the request of the owner who was directing another in the driver's seat as to the operation of the vehicle.

The question of defendant being prejudiced because the owner delayed a few days in giving notice of the injury, is no defense under the endorsements on the policy. Also, it had no foundation in fact as defendant advised the court at the pre-trial conference that there were no facts indicating any prejudice. It made a full, complete and thorough investigation, interviewed all

witnesses, and every fact in existence was at its command. It offered no evidence. Its exceptions to the instruction on this subject matter were not sufficient. It proposed no instruction upon this subject matter except the one asking that it be found as a fact that it had been prejudiced in its investigation, whereas there was no fact to warrant such an instruction.

ARGUMENT

Appellant has argued seven points upon which it asks reversal of this judgment. For continuity in this brief, we shall answer them somewhat out of order, but give each its appropriate heading.

I.

AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES

This is Paragraph V of appellant's policy. The principal argument on this appeal is based thereon. It is claimed that the original vehicle, the 1935 dump truck which caused the injury, was not covered by the policy because of this provision. Particularly, it is claimed that the coverage shifted to the 1938 vehicle before the accident occurred.

Paragraph V is quoted fully at page 78 of the Transcript of Record. The pertinent parts are:

“If the Named Insured who is the owner of the automobile acquires ownership of another automobile, such insurance as it afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions (2) insurance applies to such other automobile if it replaces an automobile described in policy and may be classified for the purpose of use stated in the policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery.”

The truck insured under the policy was a 11½ ton Ford dump truck used by the insured as a trucker employed to do W.P.A. hauling and was so designated in the policy. (Tr. 67) In using the dump truck on this work he had to and did procure a permit from the Department of Public Service of the State of Washington on October 16, 1939. He operated thereunder as authorized therein:

“Intrastate, irregular route, non-radial service as a carrier engaged in dump truck operations, in King, Snohomish and Skagit Counties.”

Plaintiff's Exhibit No. 1, (Tr. 45) To procure this permit, under the State statutes, Rem. Rev. Stat. 6382-16 and rules promulgated thereunder by that department, Bunney had to and did procure and file for the protection of the public this policy of liability insurance. Plaintiff's Exhibit No. 2. (See Tr. 99-111)

The day before the accident, Bunney bought of

Pound Motor Company and drove home another truck, consisting solely of an engine, chassis and cab. It had no bed or body whatsoever upon it. (Facts certified on Pre-Trial Hearing, Tr. p. 34-40; See p. 37, 38. Testimony G. A. Pound: Tr. 172; Testimony Orville Pound: Tr. 178.) This is the equipment referred to as the 1938 truck. The steel dump box or bed which at the time of accident had not yet been removed from the original truck, was to be placed upon the 1938 chassis so it could be used by assured in his dump truck operations. A separate wooden truck body owned by Bunney and then upon a third truck, where Pound had inspected it in negotiating for the purchase of the 1935 truck, was to be removed and placed upon the 1935 vehicle and when thus assembled, it was to be delivered by Bunney to Pound's place of business in completion of the sale of that equipment to Pound. (Facts certified on Pre-Trial Conference, Tr. 34-40; Testimony G. A. Pound, Tr. 171-7; Testimony Orville Pound, Tr. 177-81.)

This coverage did not shift from the original dump truck to the 1938 chassis before the injury to the child, because:

(1) Under the terms of that paragraph, the new vehicle must replace the old one. The bare chassis and cab had not replaced and could not replace the dump truck. (2) The chassis and cab was not and

could not "be classified for the purpose of use stated in the policy." It could not be classified as a dump truck to do W. P. A. hauling.

The case of **Mitcham v. Travelers Ind. Co. (C. C. A. 4) 127 Fed. (2d) 27**, is directly in point. There, one Gray owned a Buick automobile upon which he procured a liability policy. He then bought and used a Lincoln Zephyr. He had placed the Buick in storage and gave the bailee authority to sell it if he could, but was still the legal owner. It was contended that the insurance had automatically shifted to the new car at delivery thereof, exactly as appellant contends here. This was denied by the insurance company, as it would be denied and successfully by appellant had the 1935 truck with chassis injured this boy. The court held that there had been no replacement of the Buick by the Lincoln, and hence the coverage remained upon the Buick and was not on the Lincoln. The court said:

"Gray still retained title to the Buick and full control over it. At any time he could have taken it from the custody of the Motor Company and put it into use; at any time the Motor Company was privileged to use the car on Gray's behalf in order to demonstrate it to a customer; and in either case it would have been impossible for the company to show that the car was not still covered by the policy if an accident had occurred and liability on Gray's part had ensued. These circumstances distinguish the case from

Merchants Mutual Casualty Co. v. Lambert, 90 N. H. 507, 11 A. (2d) 361, 127 A. L. R. 483, upon which the appellant mainly relies, for in that case, although the old car covered by the policy remained in the insured's garage, with license plates attached, after the purchase of the new car, it had not been used by the insured for several months prior thereto, because it was worn out, out of repair, and not fit to be driven on the public highway. It was upon these facts that the court held that a transfer of insurance took place under the replacement clause despite the retention of ownership and possession of the old automobile by the insured."

The cases are very few dealing specifically with such a provision in a liability insurance policy. We have been able to find none sustaining appellant's position. There is one other which we feel sustains ours. That is **Thompson v. State Automobile Mutual Ins. Co., (W. Va.), 11 S. E. (2d) 849.**

One Smith owned and operated six gasoline tank trucks. They were covered by a liability policy containing the same automatic transfer clause. On December 30th, he bought a new truck, with chassis only. There was no tank upon it to convey gasoline. On January 7th, he obtained a license and thereafter used the vehicle to do limited hauling, but not of gasoline.

On March 5th, one of his six tank trucks was damaged beyond repair. He salvaged the tank therefrom and placed it upon the new truck chassis. It was then

put into use, becoming the sixth tank truck. On March 8th it ran over the plaintiff. On March 9th, the insurance company was notified of the substitution.

On suit, the insurance company claimed the truck was not covered by the policy; that the automatic insurance had not transferred to it; that to make the substitution effective, notice thereof should have been given within ten days after December 30th.

The court held that the truck was covered. The replacement occurred when the owner placed the tank from the other truck thereon so that it was capable of use and was used in the same capacity as the former vehicle. The period of ten days for notice ran from that time, rather than from the 30th of December when the owner bought and took delivery thereof.

Clearly the reasoning of that court is pertinent here. The replacement, within the meaning of the very clause here in question, did not occur until the truck was capable of doing the work of the old one and was actually put to the same use. This it could not do without the tank being placed thereon. Here, a bare chassis and cab did not and could not perform the classified purpose of the 1935 vehicle, namely, haul dirt as a dump truck until a dump body was placed thereon.

The cases cited by appellant upon this point are readily distinguishable upon the facts. **Merchants Casualty Co. v. Lambert, (N. H.), 11 Atl. (2d) 361,** is distinguished by the court in the Buick case *supra*. There a finding of fact was made that a new Pierce Arrow car had completely replaced an old discarded one "for the very same use previously made of the 1930 automobile." It was held that as this finding was fully sustained by the evidence, it followed as a logical conclusion that one injured by the new car had the protection of the carrier's policy.

There was a similar finding of replacement in use in **Dean v. Niagara Fire Ins. Co., (Cal.) 68 Pac. (2d) 1021.**

Ash-Grove Lime & P. Cement Co. v. Southern Surety Co., (Mo.), 39 S. W. (2d) 434, is not in point. It merely holds that under a fleet policy, an added vehicle under the provisions of the contract is also covered when the additional vehicle is acquired. It does not involve claimed termination upon the original vehicle.

Aetna Casualty & Surety Co. v. Chapman, (Ala.), 200 So. 425, announces the familiar rule that insurance policies must be liberally construed in favor of the insured.

Jamison v. Phoenix Indemnity Co., 40 Fed. Supp.

87, (**App. Brief 41**), holds that insurance does not automatically switch from the named vehicle to a new one, even if it has replaced the old one in use, unless the insurance company makes proof at trial that within ten days of the delivery of the new equipment, the insured gave notice of its acquisition to the insurance company. Subdivision (4) of the Automatic Provision, specifically provides that "this agreement does not apply" unless such notice be given.

In accord therewith see, also, **Mitcham v. Travelers Ind. Co.**, 127 Fed. (2d) 27, *supra*.

(2) The second reason why the 1935 truck was covered by this insurance policy lies within the policy itself. For an added premium paid by insured, this policy as on file with the Department of Public Service, bore a Compulsory Automobile Insurance Endorsement issued December 14, 1939, (Tr. 59), and the Department of Public Service Endorsement required by law and State regulation previously mentioned. (Tr. 62) The first of these provided pertinently:

"The insurance applies to any automobile or trailer used by the Named Insured at any time during the policy period under the Insured's Certificate of public convenience or necessity or permit issued in compliance with any federal or state law . . ." (Tr. 59)

The compulsory Public Service Endorsement provided:

“The policy to which this endorsement is attached is written in pursuance of and is to be construed in accordance with Chapter 184, Laws of 1935, of the State of Washington, and acts amendatory thereof and supplemental thereto, and the rules and regulations of the Department of Public Service of Washington adopted thereunder. The policy is to be filed with the state in accordance with said statute.

“In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to pay any final judgment for personal injury, including death resulting therefrom, and(or) damage to property (excluding cargo) of any person or persons other than the Insured, caused by any and all motor vehicles as defined by said Chapter 184 of the Laws of 1935, covered by the terms of this policy and endorsement, and operated by the Insured pursuant to a permit issued by the Department of Public Service of Washington in accordance with said above named chapter, and acts amendatory thereof and supplemental thereto, within the limits set forth in the schedule of insurance hereinafter set forth; and further agrees that upon its failure to pay such final judgment said judgment creditor may maintain an action in any court of competent jurisdiction to compel such payment. Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the Insured shall relieve the Company from liability hereunder or from the payment of such judgment.

“In consideration of the premium stated in the policy to which this endorsement is attached, the Company agrees to cover, in addition to the motor

vehicles named in the policy, any additional, emergency or substituted motor vehicles for a period of ten days from the date of beginning of use of such equipment; Provided, however, That in no event shall the automatic coverage extend to such additional, emergency or substituted motor vehicles if they are already covered by other valid insurance for limits of liability equal to or in excess of the limits required by said statute and the rules and regulations of the Department.

“The policy to which this endorsement is attached shall not expire, nor shall cancellation take effect, until after fifteen (15) days’ notice in writing by the company shall have first been given to the Department of Public Service of Washington at its office in Olympia, Washington, said fifteen days’ notice to commence to run from the date notice is actually received by the Department.

“Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, agreements or limitations of the Policy, other than as above stated.” (Tr. 62-6)

Mr. Blashfield, in his work on Automobile Law, states the rule applicable to such insurance riders as follows:

“By the attachment of a rider, however, the insurer may signify its willingness not to limit the insurance to the particularly specified vehicle, and this rider will be effective, as where the insurer attaches the rider provided for in some jurisdictions, known as the Public Service Commission rider, to a policy covering a particularly described motor vehicle, the effect of such a rider being to waive the description of the particular

car, and agree to make compensation to persons negligently injured or killed from operation of any motor vehicles belonging to or operated by the insured." **6 Blashfield, Sec. 3963, page 346.**

It thus appears that under the policy itself, as required by State law and regulation, this child was entitled to the protection of appellant's policy if Bunney owned the 1935 truck at the time of accident; and, similarly, under the "Compulsory Insurance Endorsement" as long as he was using it by authority of his permit whether he owned it or not.

Statutory requirements and departmental rules promulgated thereunder requiring the filing of such policies as a prerequisite to an operating permit, become a part of the policy.

6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3891, page 305.

If there be conflict between the policy and the rider, the rider will control.

6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3892, page 305-6.

II.

NOT OPERATING UNDER PERMIT

While counsel states baldly that Bunney was not operating under the public service permit, the assumption is not founded in fact. The certificate of Judge Neterer, certifying facts determined by him at the

Pre-Trial Conference, covered this situation. The full facts were disclosed to the Court at that conference. The certificate states:

“It is agreed that on the 5th day of January, 1940, pursuant to notice from the W. P. A. Authorities to assemble his equipment for inspection on a W. P. A. hauling job in which the Bunneys, including David Bunney, were to use David Bunney's truck under Public Service Certificate, David Bunney with the assistance of his brother Daniel Bunney started to move the 1935 truck so that the steel body could be taken therefrom and put on the 1938 chassis and the wooden body could be placed on the 1935 truck and it could be delivered to Pound Motors.

“After he had moved the 1935 truck a few feet one of the wheels bogged down causing the vehicle to tilt so that the gas would not feed and the motor would not run. Thereupon David Bunney got the 1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks.” (Tr. 34-40)

Thereupon the injury to the child occurred through the ignition of the gasoline.

It is apparent, therefore, that in conjunction with the Bunney hauling operations which he had been conducting under his permit, the W. P. A. Authority had ordered him to assemble his equipment for inspection. In complying with that order and in so assembling his equipment, the accident occurred. He was operating under the permit as completely as

though he had a load of gravel upon his vehicle, hauling it upon the job. He was operating under the permit when he was doing any work required thereunder. He was complying with an order directly relating to the work for which the permit was issued, when injury occurred.

III.

PASSENGER HAZARD EXCLUSION CLAUSE

The policy contains such a clause removing from its operation one entering upon, riding in or alighting from the automobile. It is designated in bold-faced type "Passenger Hazard Exclusion Clause."

While Judge Neterer referred to a passenger in the ordinary sense as being one carried in a public conveyance, the simple fact is that as a matter of law, this child was in no sense a passenger. Neither he nor the vehicle intended to go or carry anyone anywhere.

In **Bommarito v. North American Accident Ins. Co.**, 295 N. Y. S. 624, the insured used a truck which, in order to operate a buzz saw, was jacked up on blocks. It fell from the blocks and the insured fell from the truck, suffering injury. He tried to recover under the policy, claiming that the terms thereof covered bodily injury sustained by wrecking or dis-

ablement of a motor truck within which he was riding, or by being accidentally thrown therefrom. It was held that he could not recover because he was not "riding" in the truck. The court held that the word "ride" was used as an intransitive verb, meaning to be carried in any kind of a vehicle or carriage.

See, also, **Christ v. Chicago, Northwestern R. Co., (Minn.), 224 N. W. 247.**

Even a guest actually riding in a vehicle has frequently been held not to fall within such a passenger-hazard exclusion provision.

6 Blashfield, Sec. 3995, p. 366.

See, also, **Arms v. Faszholz, 32 S. W. (2d) 781.**

A passenger is defined as:

"One who travels by such established conveyance; a person conveyed on a journey; a traveler."
47 C. J. 1374.

To acquire a passenger status, one must be conveyed or intend to be conveyed or be in the act of taking passage somewhere.

Strickland v. Davis, 128 So. 233;

State v. Rector, 40 S. W. (2d) 639;

Villa v. United Elec. Rys., 155 Atl. 366;

See, also, **Gregg v. Northern Pacific R. Co.,
49 Wash. 183, 94 Pac. 911;**

McIlwaine v. Tacoma R. & Power Co., 72 Wash., 184, 139 Pac. 193;

**Dahline v. Seattle, 165 Wash. 683, 5 Pac. (2d) 1010;
10 Am. Jur., Sec. 953, page 26.**

We are at a loss to understand what possible bearing the cases cited between pages 62 and 68 can have upon this question. Where one once becomes a passenger in a conveyance, there are many cases holding that protective coverage as to that one does not necessarily terminate when the vehicle stops. There are other cases holding that where one has acquired the passenger status, he often is entitled to protective coverage although the vehicle may be at rest. And, similarly, there are cases giving such coverage to one who has attained the passenger status although he is riding elsewhere than in the seat of the vehicle. But, in each instance, the vehicle was used or to be used to take a person somewhere and that one was a passenger. In dealing therewith Judge Neterer's comment is complete. "This was not such a case." (Tr. 199.) At the time of the accident, this vehicle was not used or to be used to convey this child anywhere. He was simply performing a gratuitous favor by pouring gasoline.

We feel that this contention is too fanciful to be given further serious consideration.

IV.

EMPLOYEE EXCLUSION

This child was not an employee within the meaning of this clause, nor at all. The Supreme Court of the State of Washington has specifically so held.

In **Braley Motor Company v. Northwest Casualty Co.**, 184 Wash. 47, 49 Pac. (2d) 911, it was held that one who casually assisted in driving a truck gratuitously, was not an employee within the meaning of a clause excluding from the operation of any insurance policy, injuries to employees.

“We agree with the trial court in this view. It is evident that the word ‘employee’ was used in the insurance policy, in its ordinary and natural sense, as implying the relationship of master and servant. The service rendered by Kantonen was casual and gratuitous. He was driving the car wholly as an accommodation to the appellant, even though he may have had some incidental benefit in the way of pleasure or the hope of future business.

“In construing the language of the policy, if construction is needed, we are to keep in mind the familiar rule, that the construction will be adopted which is most favorable to the insured.”

Similarly, in **Sills v. Sorenson**, 192 Wash. 318, 73 Pac. (2d) 798, the Supreme Court held that one who accompanied another in an automobile at his request to witness the payment of a bill, was not an employee. There the exclusion clause of a liability policy with-

drew the benefits if bodily injury was suffered by an employee. The court said:

“The word ‘employee’, though more euphonious, has the same legal significance as the word ‘servant’. It imparts some sort of continuous service rendered for wages or salary and subject to the direction of the employer or master as to how the work shall be done.”

See, also, **Schanen v. Industrial Commission, (Wis.), 228 N. W. 520;**

Louisville, Evansville & St. Louis R. Co. v. Wilson, 138 U. S. 501, 34 L. Ed. 1023;

National Bank v. Fidelity & Casualty Co., 125 Fed. (2d) 920;

Continental Casualty Co. v. Shankel, 88 Fed. (2d) 819.

The rule of those decisions is of course binding in this case.

Even were the child an employee, which clearly he was not, he was not operating the vehicle.

In the Massachusetts case of **Narcross v. B. L. Roberts Co., 132 N. E. 399**, the owner of a motorcycle sued for damages one who ran into him on the highway. A statute provided that no person shall “operate” any motor vehicle unless the same be registered and one doing so cannot recover damages from another injuring him. The plaintiff had an unregistered motorcycle which he was using. He had taken it to an adjoining town to have it repaired and when

he went to get it the engine was "frozen" so that it wouldn't run. He was pushing the vehicle along the highway when struck from the rear by defendant's truck. Was the plaintiff "operating" the motorcycle? The court said:

"We are of the opinion that the plaintiff's action in pushing his disabled motorcycle along the street, did not bring him within the language or the purpose of the statute."

In **O'Tier v. Sell**, 169 N. E. 624, it was held that "operate" in the highway law signifies a personal act in working the mechanism of the automobile.

In **Underwood v. State**, an Alabama case, 132 So. 606, the court held that an automobile is not being "operated" or driven when it remains stationary during the entire time, and no one moves or attempts to move it.

In **Employers Casualty Co. v. Underwood**, an Oklahoma case, 286 Pac. 7, the question was whether a minor child of prohibited years was "operating" or "assisting in operating" steam machinery. If so, he was to be denied recovery. The trial court held as a matter of law that he was assisting in operating the machine. The supreme court said this legal conclusion was wrong. The child was placing bags in the mechanism of the machine, the lever of which was raised and lowered by a negro. It required the combined

efforts of three, including the child, to perform the completed operation. The court commented that the child did not have anything to do with the machinery except to hook up the bagging in the machine after the bale was compressed. The court said:

“Nobody was assisting in the operation of the machine except the engineer who handled the throttles, valve or clutch connecting or disconnecting its power. Such a perversion of the established meaning of the word operate in connection with machinery so extensively in use in modern life would be ridiculous.”

See, also, **State Farm Mutual Accident Ins. Co. v. Coughran**, 92 Fed. (2d) 239;

Dewhirst v. Conn. Co., 114 Atl. 100;

Ayres v. Harleysville Casualty Co., 2 S.E. (2d) 303;

Witherstine v. Employers Liability Assurance Corp., 139 N. E. 229.

Broadly, is this clause not designed to prevent the added risk when a child of immature judgment, under fourteen years of age, is at times permitted to drive or operate an automobile?

V.

THEORY OF DELAYED NOTICE

There are three sound reasons why there is no merit in this position.

First, the statutory compulsory Public Service Endorsement provided:

“Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the insured shall relieve the company from liability hereunder or from the payment of such judgment.”

6 Blashfield, Enc. of Automobile Law and Practice, Sec. 3922, page 316, states:

“Where the statute classifies automobile owners and operators on the basis of manifest financial responsibility or irresponsibility and requires insurance of those who have shown themselves irresponsible, it may properly make the requirement as to compulsory insurance that it be absolute, in the sense that breach of conditions subsequent does not defeat the rights of injured persons; but, as to noncompulsory insurance, such conditions remain valid and effective.”

Brodsky v. Motorists Cas. Ins. Co., 170 Atl. 243, 176 Atl. 143.

The claim that the insured did not give timely notice of the accident to the company is not available as a defense against the suit of this minor child.

“Under statutes and policies as to public service motor vehicles, which provide in substance whatever legal rights or equities may subsist between the insurer and the assured by reason of violation of any terms of the policy by the latter, are without effect on the rights of the public claiming under the provisions of the policy or statute, after such claim has been established by a judgment in a court of competent jurisdiction, judgment against the insured is conclusive in favor of the person injured, as against the liability insurer under such a policy, irrespective of any equities between insured and insurer by rea-

son of asserted breach of conditions.” 6 **Blashfield, Enc. of Automobile Law and Practice, Sec. 4076, page 442.**

American Fidelity & Casualty Co. v. Williams, (Texas) 34 S. W. (2d) 396.

“Under such statutes, whereby policies issued to motor carriers are deemed to be for the benefit of the traveling public, by reason of any violation of the terms of the policy, the rights of the public who claim under the provisions of the policy or statute, after such claim has been substantiated by a judgment at law cannot be affected by legal rights or equities subsisting between the insured and the insurer.” 6 **Blashfield, Enc. of Automobile Law and Practice, Sec. 4079, page 446.**

Boyle v. Manufacturers’ Liability Ins. Co., 115 Atl. 383.

“A different rule applies in the case of a motor carrier’s liability policy issued to comply with a statute, the purpose of which is the protection of passengers and members of the public who may be injured by negligence in the operation of public service vehicles, and in such cases the purpose of the statute will not be disregarded or the protection afforded by it diminished by placing it in the control of the insured to nullify them by failure to comply with a condition; and hence a failure to give notice as required by the policy . . . whatever their effect as between insured and insurer, will not deprive the traveling public, for whose protection the insurance is required and effected, of its protection.” 6 **Blashfield, Enc. of Automobile Law and Practice, Sec. 4080, page 450-1.**

Ott v. American Fidelity & Cas. Co., 159 S. E. 635;
Boyle v. Manufacturers Liability Ins. Co., 115 Atl. 383;

American Fidelity & Cas. Co. v. Big Four Taxi Co., 163 S. E. 40.

“Whatever the form of statute, or whether there is any statute directly ruling the particular situation, the language of the policy itself or of its indorsements or riders may be such an absolute and unequivocal promise to pay the injured person, in the event of injury under the policy, that conditions, such as that of notice, while operative as to the insured, do not vitiate or impair the rights of the persons injured.” **6 Blashfield, Enc. of Automobile Law and Practice, Sec. 4080, page 452.**

Second: After pleading affirmatively that it had been prejudiced in its investigation because its insured did not report the injury of January 5th until February 1st, it carried this theory forward by a proposed instruction asking the jury to find as a fact that because of this short delay of notice, prejudice had occurred. But when asked by Judge Neterer wherein or how defendant was so prejudiced, its counsel did not and could not state a single fact supporting the claim. On trial it offered no evidence. Under the theory of its only instruction thereon, there was no fact whatsoever to submit for the jury's determination.

At the pre-trial conference, it was disclosed that immediately upon receipt of notice, the company made its investigation. Every witness to the happening still lived within a few blocks of the scene. They were

all interviewed. Mr. Pound and his son were the only other persons having any information. They also lived in Mount Vernon. They were interviewed. Their records were photographed and serve as exhibits here. Everything pertaining to the entire situation was learned as fully as could have been done a few days earlier. All facts were disclosed. (See Tr. p. 39)

Third: The issue which appellant argues is not the one submitted to the trial judge at the pre-trial conference, nor sought to be submitted to the jury by its proposed instruction, namely, whether or not in fact appellant suffered prejudice. The issue argued is reasonableness of notice. That question was not and is not in this lawsuit. It was not presented as an issue to the judge at the pre-trial conference, nor to the jury by any proposed instruction offered by appellant.

It is true that in the two Washington cases cited: *Dowell Inc. Co. v. United Pacific Cas. Co.*, 191 Wash. 666, at page 682, 72 Pac. (2d) 296, and *Horsfall v. Pacific Mutual Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, the court said that "immediate notice" provisions are not to be disregarded where the issue is properly raised that a policyholder has not complied with the contract on which he sues. It is also true that in cases where reasonableness of notice is made

a factual issue, the question of the reasonableness thereof is usually to be determined by the jury. It is likewise true that in the case of **Finkelberg v. Continental Casualty Co.**, 126 Wash. 543, 219 Pac. 12, the court said:

“By the settlement with respondent, Tanaka was not required to give notice, and if he were so required and failed to give notice, this would not in anywise affect the rights of appellant. He could neither destroy the rights of appellant by his agreement with respondent, nor by his negligence to give notice to respondent.”

But all of this is far afield.

Appellant says that the issue of reasonableness of notice is a jury question; that this judgment should be reversed and a new trial had wherein that issue is submitted to the jury. The fallacy of its position is two-fold. The theory which it proposed in pre-trial conference and by instruction was that it had been prejudiced in its investigation by a few days' delay. But the facts were that the reverse was true. (Tr. 38-9)

There being no factual issue, the court could not submit its proposed instruction seeking a factual finding that it had been prejudiced. Failure to interject by instruction an issue upon which there is no evidence, is not error. But so to present such an issue, where there is no factual foundation therefor, would be error.

“It is the settled rule in this jurisdiction that it is prejudicial error to submit to the jury the question where there was no substantial testimony upon which to base the instruction.” **Neeley v. Bock**, 184 Wash. 135, 50 Pac. (2d) 524. See compilation of cases cited therein.

Second: Appellant proposed no instruction designed to create a factual issue on whether the contractual requirement of the insured to give notice had been performed faithfully. In the absence of such a proposed instruction, no error can be raised for failure to submit such an issue.

“If a party desires to have the instructions adapted to a particular view of the case, or to meet a situation which he conceives ought to be covered, it is his duty to specially request them, and in the absence of such a request, a mere omission upon the part of the court to instruct is not error. **Hiscock v. Phinney**, 81 Wash. 117 at 123, 142 Pac. 461.

See, also, **Zolawenski v. Aberdeen**, 72 Wash. 95 at 98, 129 Pac. 1090; **Sladjoe v. National Casualty Co.**, 95 Wash. 522, 164 Pac. 203.

“Assuming that it was error for the court to fail to instruct upon the issue as to the scale, it was not an error on which the respondent could rely . . . The failure to so instruct was a non-direction and not a misdirection.” **Lydon v. Exchange Nat'l Bank**, 140 Wash. 317, 248 Pac. 806.

Where an oral request was made upon the court at the close of a jury charge, to instruct upon an

issue which counsel though had been overlooked, the Supreme Court of the State of Washington said:

“To countenance that practice would be not only to encourage and invite error, but in many, if not most, instances it would make error inevitable. Judges are but men, with all of the usual human limitations, and trial judges work under a time pressure in order to expedite business. Under such conditions, probably no man living and none known to legal history, could, offhand and upon an unforeseen demand, correctly define every one of the niceties and fine distinctions of the law, and so accurately and fully instruct the jury on every legal issue in the case as to avoid error.” **Ogilvie v. Hong, 175 Wash. 209, 27 Pac. (2d) 141.**

The exception taken to the instruction given was not sufficient to raise this issue. That exception reads:

“Also excepts to the instruction of the court removing from the jury the delayed notice given to the defendant in this case. While there was no evidence from the defendant that they were prejudiced, yet delayed notice would indicate that (they) considered they had no coverage, and it should have gone in, at least for that purpose.” (Tr. 198.)

Obviously an implication, if this be one, that Bunney didn't consider himself covered, although he gave notice the first of the month following the accident, could in no manner be considered as evidence that the company had been prejudiced.

An objection or exception does not call for the

court himself to formulate an instruction. It does not serve the function of a proposed instruction.

Brammer v. Lappenbusch, 176 Wash. 625 at 635, 30 Pac. (2d) 947.

VI

TRANSFER OF INTEREST IN VEHICLE

Three cases are cited on this point. They have nothing to do with this lawsuit. The subject matter under this heading is thoroughly discussed in the next subdivision of this brief. We merely wish to distinguish those three cases.

Two of these cases involve fire insurance policies. **Continental Insurance Co. v. Michaels**, cited as 13 S.W. 465, the true citation of which is 13 S.W. (2d) 465, involved a clause in a fire insurance policy different than the one here in question. These fire insurance policy cases are wide of the mark as they deal with fire hazards where someone other than the insured has control of the premises. The policy in the instant case has to do with the sale of the vehicle where the owner parts with his interest or ownership therein. This the jury found he did not do. The fire insurance policy in the above case, terminated the insurance, cancelled the coverage if the insured became other than unconditional owner, or in case of

any change in the nature of the insurable interest either by sale or otherwise. The owner executed a conditional sales contract which was placed of record and the property was delivered to the vendee. The court said the vendee became the owner of the property and the seller was a mortgagee. At any event, there was no conditional sales contract involved in this case, and under the law of the State of Washington, if there were a conditional sale, the vendee is not the owner and the original owner is not a mortgagee.

Farmers & Merchants Insurance Co. v. Jensen, 76 N.W. 577, was a case decided in 1898. It merely held that the insurance terminated when the owner conveyed the premises by a warranty deed.

Keneagh v. Baker, 284 S.W. 321, was a case where it was contended that a bond given to protect the owner of a vehicle should be construed to cover and protect a third person who bought the principal's car. The court said it would be "preposterous" to hold that the bonding company should be responsible for the acts of another whom it never agreed to bond.

VII

SALE OF TRUCK — PASSING TITLE — BUNNEY NOT OWNER

Pages 42 to 57, Appellant's Brief, are devoted to

an argument that legal title to the 1935 truck and equipment had passed from Bunney before the accident occurred. That was the one factual issue in the lawsuit, and a complete answer is found in this: The jury, by its verdict, established the fact contrary to appellant's contention.

Did the jury have that power?

The Uniform Sales Act in effect in the State of Washington at the time of this occurrence, provided as follows:

Rem. Rev. Stat. 5836-18:

“Property in specific goods passes when parties so intend.

“(1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

“(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.”

Rem. Rev. Stat. 5836-19:

“Rules for ascertaining intention.

“Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

“(1) Where there is an unconditional contract to sell specific goods, in a deliverable state, the

property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

(2) Where there is a contract to sell specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

(5) If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon."

With these positive requirements of statute in mind, certain facts are to be remembered. For the property in the goods to pass from Bunney to Pound before delivery to Pound, the parties to the contract must be found to have so intended. This requires a definite, positive and unequivocal meeting of the minds. Pound and his salesman both assert that under the agreement of sale Bunney agreed to make delivery of the property before the sale was complete. (Tr. 173-4; 178-9.) Certainly it cannot be said as a matter of law that the parties had mutually agreed that title and ownership in the property was to pass to Pound before delivery thereof.

This property was not in a deliverable state.

Undisputedly, the truck had upon it a steel body

which was not to be the property of Pound. Undisputedly, a wooden body which was then upon another truck was to become the property of Pound. That wooden body had to be removed; a steel body had to be removed; and the bodies exchanged before the truck was put in a deliverable state. The law says that until this is done, in the absence of positive agreement, title and ownership of the property remained in the seller.

Undisputedly, the property had not been delivered to Pound. The law says that if the contract to sell requires the seller to deliver the goods, the property does not pass until the goods have been delivered. Pound says there was such an agreement. At best, the fact is in dispute. The jury has the right to pass upon the matter and if it believes Pound and his salesman, then a contract existed requiring the seller to deliver, and as he had not done so the law places the ownership of the goods at that time in the seller Bunney. The jury so found. This court does not concern itself with the weight of evidence. **O'Brien Manual of Federal Appellate Procedure, 3rd Ed., p. 188.**

Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 33 S. Ct. 68, 57 L. Ed. 170, 173;

Steil, et al, v. Holland, et al. (CCA 9), 3 F. (2d) 776;

Myers v. Brown, et al, (CCA 9), 102 F. 250;

American Film Co. v. Moye (CCA 9), 267 F. 419, 421;

Columbia Agricultural Co. v. Seid Pak Sing (CCA 9), 267 F. 1;

Pennsylvania Casualty Co. v. Whiteway (CAA 9), 210 F. 782, 784;

Gilmore v. McBride (CAA 9), 156 F. 464, 465;

Eastern & Western Lumber Co. v. Rayley, (CCA 9), 157 F. 532, 533;

Duncan v. A. T. & S. F. Ry. Co., et al, (CAA 9), 72 F. 808, 810.

In **Gillingham v. Phelps, 11 Wash. (2d) 492, 119 Pac. (2d) 914**, the Supreme Court of the State of Washington, in interpreting the Uniform Sales Act, held that the time at which the parties intended legal title to pass on sale of personalty was a question of fact for a jury to determine.

Appellant confuses the State registration card with legal title. The State certificate is not legal title. If one sells and passes legal title, he is required to give over this certificate, but the transfer or withholding of that paper does not accomplish or defeat the passing of legal title by sale. The sale and intention of the parties making it, not the transfer of the certificate, passes title. One may actually sell but withhold the certificate. Conversely, one may pass the certificate and yet remain the lawful owner of the vehicle. The Supreme Court of Washington has made this

distinction clear. In **Junkin v. Anderson**, 12 Wash. (2d) 58, at page 74, 120 Pac. (2d) 548, the court said:

“The statute does not purport to make void transfers accomplished without compliance with the above-mentioned provisions, nor does it make the purchaser’s act unlawful . . . respondent may not prevail because the certificate of registration of title did not show ownership in appellant.”

See, **Hartford v. Stout**, 102 Wash. 241, 172 Pac. 1168; **Kimball v. Donohue**, 124 Wash. 505, 214 Pac. 1045; 217 Pac. 37.

The passing of the certificate was merely evidence considered by the jury along with all of the other evidence in the case in determining when and how the parties intended legal title and ownership of the truck to pass. It was not conclusive. But the verdict of the jury is.

See, also, **Cerex Co. v. Peterson (Iowa)**, 212 N. W. 890;

Shepard v. Findley (Iowa), 214 N. W. 676;

Commercial Credit Co. v. McNelly (Dela.) 171 Atl. 446;

Janney v. Bell, 111 Fed. (2d) 103.

THE CASE OF MILES VS. BUNNEY

Appellant devotes three pages to analysis and comment upon this case. It has nothing to do with this litigation, except to afford counsel an opportunity to

suggest that the writer of this brief was counsel in that case and should not be able to reverse his position. We have not done so, but under the law one may do so where, as here, different parties are involved.

15 R. C. L., Sec. 481, page 1008, states:

“In a second suit against one who was a stranger to the first suit, a party may adopt a position inconsistent with that maintained in the prior proceeding.”

That is true as to the ownership of a vehicle doing injury. **Baxter v. Central West Casualty Co., 186 Wash. 459, 58 Pac. (2d) 835. 6 Blashfield, Enc. of Automobile Law and Practice (Supplement) Sec. 4076, p. 184 of Supplement; Whitney v. Employers Indemnity Corp., (Iowa) 202 N. W. 236; 41 A. L. R. 495.**

The question would be one of estoppel which is an affirmative defense not here plead. **Butler v. Supreme Court of Foresters, 53 Wash. 118, 101 Pac. 481.**

All argument is concluded by the admission on page 56 Appellant's Brief. “The Miles case is, of course, not res judicata here, the parties being different . . .”

However, we are not known to this court, and we wish to appear before this tribunal for the first time free from such a suggestion. The original pleadings in that case, the statement of facts on appeal, and briefs, were before Judge Neterer at the Pre-Trial Conference. The complaint alleged that we did not know whether Bunney or Pound owned the 1935 truck

at the date of the accident. For the purpose of that trial, Pound's insurance carrier desired to raise a single legal question: Admitting that Pound was the owner, they wished to claim that Bunney would bear the relationship of independent contractor. To that end and for the purpose of that litigation, counsel for Pound's insurance carrier admitted in open court that we should proceed upon the assumption that Pound was the owner. The sole question briefed and argued was that of the independent contractor relationship. If this court is interested in that 5-4 en banc decision, see **Miles v. Bunney**, 10 Wash. (2d) 492, 117 Pac. (2d) 179. Consideration of that opinion must be had, as was done by Judge Neterer, in light of the way the litigation arose. It should not be read as a judicial determination, had upon disputed facts, that legal title to this truck had passed to Pound.

CONCLUSION

We respectfully submit that Judge Neterer grasped with an accuracy and clarity not had by most of us practitioners, the simplicity and the real issues in this lawsuit. He dealt with it patiently and justly. The judgment upon the verdict and his denial of Motions N.O.V. and for a New Trial should be affirmed.

Respectfully submitted,
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 HENDERSON & McBEE
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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED INDEMNITY CORPORATION,
a corporation, *Appellant,*

vs.

LAWRENCE P. BUNNEY, as Guardian of
WILMER BUNNEY, a minor, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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SUBJECT INDEX

| | <i>Page</i> |
|---------------------------------------|-------------|
| Appellee's Statement of the Case..... | 1 |
| Automatic Coverage Provision | 2 |
| Conclusion | 10 |
| Delayed Notice | 9 |
| Employee Exclusion | 8 |
| Operation Under Permit | 7 |
| Transfer of Interest | 9 |

TABLE OF CASES

| | |
|--|---------|
| <i>Aetna Cas. & Surety Co. v. Chapman</i> , 200 So. 425 | 4 |
| <i>Braley Motor Co. v. Northwest Cas. Co.</i> , 184 Wash. 47, 49 P.(2d) 911 | 8 |
| <i>Comm'l Stan. Ins. Co. v. Foster</i> , 155 Kan. 837, 130 P.(2d) 621 | 8 |
| <i>Continental Ins. Co. v. Michaels</i> , 13 S.W.(2d) 465 | 9 |
| <i>Farmers and Merchts. Ins. Co. v. Jensen</i> , 76 N.W. 577 | 9 |
| <i>Foster v. Comm'l Stan. Ins. Co.</i> (C.C.A.) 121 F. (2d) 117 | 7-8 |
| <i>Keneagh v. Baker</i> , 284 S.W. 321..... | 9 |
| <i>Maryland Cas. Co. v. Toney</i> , 16 S.E.(2d) 340.... | 5, 6, 7 |
| <i>Mitcham v. Travelers Ind. Co.</i> (C.C.A. 4) 127 F. (2d) 27 | 2 |
| <i>Sills v. Sorenson</i> , 192 Wash. 318, 49 P.(2d) 798.... | 8 |
| <i>Thompson v. State Auto Mut. Ins. Co.</i> , 11 S.E. (2d) 849 | 3, 4, 6 |

STATUTES

| | |
|--|---|
| Remington's Revised Statutes of Washington §6382-16 | 1 |
|--|---|

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No. 10349

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APPELLANT'S REPLY BRIEF

APPELLEE'S STATEMENT OF THE CASE

Page two of Appellee's brief quotes from Rem. Rev. Stat. §6382-16. We merely wish to point out that in that very quotation from the statute it is clear that it is for "the reasonable *protection of the public* against damage and injury for which such carrier may be liable by reason of the *operation* of any motor vehicle," and in the second paragraph quoted, "the department shall give due consideration to the *character* and amount of *traffic* and the *number of persons* affected and the *degree of danger which the proposed operation involves.*"

This argues better than we could state it that the

object of the statute was to protect the general public on the *streets and highways* from the "Operation" of the trucks. Changing the body from a truck that had been removed from that service could in no sense be considered under the permit or statute.

The transferring of the bodies may just as well have taken place in a garage as in a "stub street, a dirt street, right adjoining the Bunney's home" (Opening statement of Appellee's counsel, Tr. 147). If it had happened in a garage, would it be contended that it was under the Permit?

AUTOMATIC COVERAGE PROVISION

Appellee insists that the insurance did not pass to the newly acquired truck because it had not yet had the body placed thereon. They were in one of the acts of placing the body thereon when the accident occurred. They were using the 1938 truck at the time in that very act. Witness the following from Tr. 37 and 38, Court's Pre-trial Certificate:

"Thereupon David Bunney got the 1938 chassis and cab, called the 1938 truck, and hitched on to the other truck and attempted to pull the vehicle out, by means of a physical connection between the two trucks."

The 1935 truck had been taken out of service as has been pointed out in our opening brief, sold and the title transferred to Pound Motor Co., yet appellee insists that it was still in the service of the W.P.A.

Appellee cites the case of *Mitcham v. Travellers Ind. Co.* (C.C.A. 4) 127 F.(2d) 27, on page 11 of his brief. Inasmuch as we cited and quoted from that case we will not allude to it again. A careful reading

of the case itself will determine which side the case supports.

Appellee cites the case of *Thompson v. State Auto Mutual Insurance Co.* (W. Va.) 11 S.E.(2d) 849, on page 12 of his brief.

This case is easily distinguishable on the facts from the case at bar. In that case the only trucks covered by the insurance policy were 6 tank trucks under "Fleet Coverage," used in hauling gasoline from oil wells. The defendant Thompson had other trucks which he used in general hauling.

At the time he purchased the truck in question it had the *regular truck body* and was used in general hauling with no intention of putting it to tank use or replacing a tank truck. He purchased it in December 30, 1937, and obtained a license January 7, 1938, and used it in general hauling until March 5th, 1938. On that date one of the tank trucks was so badly damaged that it was destroyed and the tank taken therefrom and put on the truck in question, it was then placed in the gasoline haulage to replace the destroyed automobile. The insurance policy *expressly stated* that *all the trucks have tank bodies*.

The court held that this truck never replaced the tank truck until it was taken from general hauling and placed in use to replace the destroyed tank truck.

How different this is from the case at bar. The 1938 truck was purchased particularly to replace the 1935 truck. Witness the following quoted from Appellee's opening statement (Tr. 145):

"(By MR. WELTS): David Bunney was doing this hauling with his truck, and wanted a better

truck necessary to do that hauling, and he negotiated with a local company there known as Pound Motor Company, after he had been notified by the W.P.A. authorities to have his equipment inspected for continued work on that job. So, to get a newer vehicle to use, along the latter part of December, 1939, and first part of January, 1940, he was negotiating with Pound Motor Company of Mt. Vernon for a 1938 Ford Chassis and Cab. * * *

There is no contention in this case that this 1938 truck was not bought to replace the 1935 truck.

In the *Thompson* case the truck purchased could not replace the tank truck for no premium had been paid for any insurance upon it, and as has been pointed out in previous cases cited the automatic coverage provision in the policy is used so that there will be only one truck covered by one premium, for "the insurance shall automatically terminate upon the replaced automobile at the time of such delivery." *Aetna Casualty & Surety Co. v. Chapman* (Ala.) 6 Div. 768, 200 So. 425.

Here in our case the intent was to replace the 1935 truck immediately with the 1938 truck and in the *Thompson* case there never was such intention until one of the tank trucks was suddenly destroyed two months later.

On pages 16, 17 and 18 of the answering brief, Appellee quotes from the Public Service Endorsement and quotes from Blashfield and argues (page 18) that even if Bunney didn't own it that it would be covered any way. Well, if Bunney didn't own it,

Pound Motor Co. did and certainly Bunney wasn't operating it under the Permit.

There is a statement which occurs in Appellee's brief and the statement of the court in the Pre-trial Certificate that the W.P.A. authorities had ordered him to assemble his equipment for inspection (Tr. 37). What was he doing at the time of the accident? He was trying to get the 1938 truck ready for inspection, not the 1935 truck as he was going to take its body off and put it on the 1938 truck. Could anything be more conclusive that the 1935 truck had been taken out of the W.P.A. service and out from under the Permit?

Another case in point is *Maryland Cas. Co. v. Toney* (Va.) 16 S.E.(2d) 340. This case has just come to our attention and is not cited in our opening brief.

In this case the court said (page 343) after quoting the automatic coverage provision of the policy:

"The policy provides coverage to the owner of the insured automobile whenever he 'acquires ownership of another automobile' and such insurance applies to such other automobile 'as of the date of its delivery to him.' The insured is afforded protection from the earliest time he needs protection—that is, from the time the new car is delivered to him. Protection is not delayed until ownership is complete in the insured or until the title is registered in his name, or *even until the newly acquired car is placed in service.* From the time of the delivery of the car to the insured—that is from the date he takes possession of it—he is protected by the policy. * * *

'Under clause (3) the insurance afforded by this

policy automatically terminates upon the replaced automobile at the date of such delivery.' This provision is likewise for the benefit of the insurer and is inserted in order that it may not be held liable for risk incurred by operation of the old car after coverage has applied to the newly acquired car. * * * It will be observed that the *date of delivery* of the newly acquired car is the pivotal date in each of these clauses. The insurance attaches to the newly acquired automobile, 'as of the date of its *delivery*' to the insured and automatically *terminates* upon the old car 'at the date of such delivery' provided the insurer notifies the company within 10 days following 'the date of delivery of such other automobile' to him.

"It is true that the policy limits the coverage of the newly acquired car to one which 'replaces' the automobile described in the policy. But as we have seen, the purpose of this latter clause is to limit the coverage on the newly acquired car to the 'use stated in this policy' in order that the risk assumed on the new car may be the same as that carried on the old car, * * *.' Can it be doubted that if Kelley had had an accident on January 31st while returning from Roanoke to Clifton Forge with the newly acquired Dodge car, and had notified the Insurance Company thereof within the prescribed 10 days he would have been protected under the policy? We think not."

The case goes on and distinguishes the *Thompson* case saying, page 344:

"Moreover until the date of substitution, *all* of the trucks mentioned in the policy were in actual use and remained covered by the insurance. Hence coverage under the policy did not attach to the new truck until the day of the substitution."

This case (the *Toney* case) says:

“The rights of Toney, the judgment creditor, under the policy, can, of course, rise no higher than those of Kelley, the insured. If Kelley is protected by the policy, then the judgment creditor is entitled to recover of the insurance company. If, on the other hand Kelley, the insured, has no claim against the insurance company, his judgment creditor has none.”

OPERATION UNDER PERMIT

We have answered somewhat appellee's argument in the previous few pages.

Appellee states on page 18 of his brief:

“While counsel states baldly that Bunney was not operating under the public service permit, the assumption is not founded in fact. The certificate of Judge Neterer, certifying facts determined by him at the Pre-Trial Conference, covered this situation.”

Appellee is mistaken. A pre-trial conference is held to see what the parties can agree on and eliminate the necessity of bringing witnesses to testify to non-disputed facts. In the Pre-Trial Certificate cited by appellee is the following (Tr. 36):

“Attorneys for the defense do not admit that the permit was in effect at the time of the injury.”

Consequently the court did *not* find that the 1935 truck was under the permit at the time of the accident.

The United States Circuit Court of Appeals, 10th Circuit, in the case of *Foster v. Commercial Stan. In-*

urance Co. (1941) 121 F.(2d) 117, in affirming *Commercial Stan. Insurance Co. v. Foster*, 155 Kan. 837, 130 P.(2d) 621, held with our contention that the permit merely covered the operation of the truck under the permit and not the personal business of the insured. In that case the insured drove off his regular route on some business of his own. Could the switching of the bodies of these two trucks be a W.P.A. project? As well urge that the selling of the 1935 truck and the purchase of the 1938 truck was a W.P.A. project.

EMPLOYEE EXCLUSION

On page 23 of his brief Appellee cites *Braley Motor Co. v. Northwest Casualty Co.*, 184 Wash. 47, 49 P. (2d) 911.

This was a case where a person who was working on a commission basis volunteered to drive a truck part way on the trip. He wasn't ordered to do it. The court said in part, "Kantonen, admittedly was not an employee of the Braley Motor Co. etc."

Next cited is *Sills v. Sorenson*, 192 Wash. 318, 73 P.(2d) 798. This was an argument over the guest statute in an automobile accident. They held that Sills was an independent contractor, because the manner of doing the particular work was left entirely up to Sills. In the case at bar, Wilmer Bunney was told every detail of the work to be performed and how to do it.

The other cases cited from other jurisdictions can be easily distinguished on the facts.

DELAYED NOTICE

We believe we have covered this fully in our opening brief.

TRANSFER OF INTEREST IN VEHICLE

Appellee's only answer to our citation of *Continental Insurance Co. v. Michaels*, 13 S.W.(2d) 465, is that it was a fire case. That might be but the law is the same for a spotted horse as for a white one. However, it was an automobile case and the law would have been the same if the car had been in an accident instead of burning up.

We cited *Farmers & Merchants Insurance Co. v. Jensen*, 76 N.W. 577. Appellee points out that the case was decided in 1898! If it is not still the law appellee should show where it had been overruled. If there is a limitation on the validity of a decision we have not heard of it. Appellee goes on to say: "It merely held that the insurance terminated when the owner conveyed the premises by warranty deed." Yes, that is right, the court "merely held" that a change in the ownership of the property voided the insurance.

We cited *Keneagh v. Baker*, 284 S.W. 321.

Appellee says, page 35, that the court held that it would be "preposterous" to hold that the bonding company should be responsible after title had been transferred from one person to another. We agree with this. This is what we contended in our brief. But he does not answer to the force of that citation.

CONCLUSION

Owing to the shortness of time at our disposal we shall not address ourselves to the other arguments of appellee. A careful reading of the cases will, in the last analysis, be the best argument that can be made for either side. With that we rest our case.

We earnestly submit that the judgment of the court below be reversed as asked in our opening brief.

Respectfully submitted,

N. A. PEARSON,
Attorney for Appellant.

Office and P. O. Address:
413 Arctic Building,
Seattle, Washington.

No. 10355

United States
Circuit Court of Appeals
For the Ninth Circuit.

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation,

Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the Pacific Compensation District,
and **LELAND T. McCLEES,**

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Territory of Hawaii

FILED

FEB 25 1943

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation,
Appellant,
vs.

JOHN C. GRAY, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the Pacific Compensation District,
and LELAND T. McCLEES,
Appellees.

Transcript of Record

**Upon Appeal from the District Court of the United States
for the Territory of Hawaii**

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | Page |
|--|------|
| Answer of John C. Gray, Deputy Commissioner | 22 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record on | 101 |
| Cost Bond on | 98 |
| Designation of Parts of Record Necessary for Consideration on, Appellant's (CCA) | 105 |
| Notice of | 97 |
| Statement of Points to be Relied Upon on, Appellant's (CCA) | 103 |
| Stipulation as to Record on | 99 |
| Certificate of Clerk to Statement..... | 3 |
| Certificate of Clerk to Transcript of Record on Appeal | 101 |
| Clerk's Statement | 2 |
| Complaint | 5 |
| Cost Bond on Appeal..... | 98 |
| Designation of Parts of Record Necessary for Consideration on Appeal, Appellant's (CCA) | 105 |

| | Index | Page |
|---|-------|------|
| Exhibits: | | |
| Answer of Employer..... | | 40 |
| Copy of Award of Compensation..... | | 47 |
| Employee's Claim for Compensation..... | | 42 |
| Employer's Report | | 35 |
| Letter of J. W. Cooper, M. D..... | | 45 |
| Notice that Claim will be Controverted.... | | 38 |
| Transcript of Testimony before Deputy Commissioner | | 51 |
| Findings and Conclusion..... | | 27 |
| Judgment | | 96 |
| Minutes of Court: | | |
| Thursday, Oct. 8, 1942 (Hearing Motion to Dismiss) | | 93 |
| Saturday, Oct. 24, 1942 (Hearing Motion to Dismiss) | | 94 |
| Saturday, Nov. 7, 1942 (Hearing Motion for Default) | | 94 |
| Monday, Nov. 16, 1942 (Hearing on Offer of Evidence) | | 95 |
| Motion for Default and Affidavit of Clerk..... | | 25 |
| Motion to Dismiss | | 20 |
| Names and Addresses of Attorneys of Record. | | 1 |

| Index | Page |
|---|-------------|
| Notice of Appeal..... | 97 |
| Reporter's Transcript | 78 |
| Statement of Points to be Relied Upon on Appeal, Appellant's (CCA) | 103 |
| Stipulation as to Record | 99 |
| Stipulation re John C. Gray..... | 21 |
| Summons | 18 |
| U. S. Marshal's Return..... | 19 |

NAMES AND ADDRESSES OF
ATTORNEYS OF RECORD

For the Plaintiff, Liberty Mutual Insurance Company, and Contractors, Pacific Naval Air Bases:

ANDERSON, WRENN & JENKS

Bank of Hawaii Building
Honolulu, T. H.

For the Defendant, Andrew R. Schmitz (John C. Gray)

ANGUS M. TAYLOR, JR.

United States Attorney
Federal Building
Honolulu, T. H. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court for the
Territory of Hawaii

Civil No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al.,
Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner of
the United States Employees' Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, claimant,
Defendants.

CLERK'S STATEMENT

Time of Commencing Suit:

August 5, 1942—Complaint filed.

Names of Original Parties:

Liberty Mutual Insurance Company, and "Con-
tractors, Pacific Naval Air Bases", Plaintiffs;
Andrew R. Schmitz, and Leland T. McClees,
Defendants.

Dates of Filing Pleadings:

August 5, 1942—Complaint and Summons.

September 30, 1942—Motion to Dismiss.

October 31, 1942—Stipulation for Substitution of
Parties.

October 31, 1942—Answer of John C. Gray, Dep-
uty Commissioner.

November 4, 1942—Motion for Default and Affidavit of Clerk.

November 24, 1942—Findings and Conclusion.

December 29, 1942—Judgment.

Times When Proceedings Were Had:

October 8, 1942—Hearing on Motion to Dismiss.

October 24, 1942—Hearing on Motion to Dismiss.

November 7, 1942—Hearing on Motion for Default.

November 16, 1942—Hearing on Offer of Evidence. [2]

Proceedings in the above entitled matter were had before the Honorable Delbert E. Metzger, Judge, United States District Court, Territory of Hawaii.

Dates of Filing Appeal Documents:

January 2, 1943—Notice of Appeal to Circuit Court of Appeals.

January 2, 1943—Cost Bond.

January 2, 1943—Stipulation as to Record.

**CERTIFICATE OF CLERK TO THE
ABOVE STATEMENT**

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of com-

mencement of the above-entitled cause; the names of the original parties, the dates when the respective pleadings were filed; the times when proceedings were had; the name of the judge presiding, and the dates when appeal pleadings were filed and issued in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 20th day of January, A. D. 1943.

[Seal]

WM. F. THOMPSON, JR.

Clerk, United States District
Court, Territory of Hawaii.

[3]

In the District Court of the United States
for the Territory of Hawaii

Civil Action No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, and HAWAIIAN
DREDGING COMPANY, LIMITED, a
Hawaiian corporation, RAYMOND CON-
CRETE PILE COMPANY, a New Jersey cor-
poration, TURNER CONSTRUCTION COM-
PANY, a New York corporation, MORRISON-
KNUDSEN COMPANY, INC., a Delaware
corporation, J. H. POMEROY & CO., INC., a
Washington corporation, UTAL CONSTRUC-
TION COMPANY, a Utah corporation, W. A.
BECHTEL COMPANY, a California corpora-
tion, and JOHN E. BYRNE, of Dallas, Texas,
doing business as “Contractors, Pacific Naval
Air Bases”,

Plaintiffs,

v.

ANDREW R. SCHMITZ, Deputy Commissioner of
the United States Employees’ Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, Claimant,
Defendants.

COMPLAINT

To the Honorable the Presiding Judge of the Above
Entitled Court:

Come now Liberty Mutual Insurance Company, and Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Company, Inc., J. H. Pomeroy & Co., Inc., Utah Construction Company, W. A. Bechtel Company and John E. Byrne, plaintiffs above named, and complaining of Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation District, [5] and Leland T. McClees, defendants above named, allege and show unto this Honorable Court as follows:

I.

That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U.S.C.A., Secs. 1651-1654) (Defense Bases Act), and particularly by reason of Section 1653(b), reading as follows:

“(b) Judicial proceedings provided under sections 918 and 921 of Title 23 in respect to a compensation order made pursuant to sections 1651-1654 of this title shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs”;

that in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended (49 Stat. 921, 33 U.S.C.A., Sec. 921).

II.

That Liberty Mutual Insurance Company is and at all times mentioned herein was a Massachusetts corporation duly licensed to engage in and engaged in the insurance business in the Territory of Hawaii; that Hawaiian Dredging Company, Limited is a Hawaiian corporation; that Raymond Concrete Pile Company is a New Jersey corporation; that Turner Construction Company is a New York corporation; that Morrison-Knudsen Company, Inc., is a Delaware corporation; that J. H. Pomeroy & Co., Inc., is a Washington corporation; that Utah Construction Company is a Utah corporation; that W. A. Bechtel Company is [6] a California corporation; that John E. Byrne is an individual doing business at Dallas, Texas; that said corporations and said John E. Byrne are and at all times mentioned herein were associated in a joint venture for the prosecution of certain defense projects on the Island of Oahu and are commonly referred to and known as "Contractors, Pacific Naval Air Bases", and will be hereinafter referred to as "Contractors".

III.

That Andrew R. Schmitz, a citizen of the United States residing in Honolulu, City and County of

Honolulu, Territory of Hawaii, now is and at all times herein mentioned was Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, having offices at 407 Hawaiian Trust Building, said Honolulu; that Leland T. McClees is a resident of Honolulu aforesaid and is a claimant under said Defense Bases Act.

IV.

That said Contractors were, in the month of April, 1942, engaged in the prosecution of certain defense work at Kaneohe, Island of Oahu; that all workmen's compensation insurance in connection with said work at Kaneohe, including workmen's compensation under the so-called Defense Bases Act (55 Stat. 62, 342 U.S.C.A. 1651-1654) during the said month of April, 1942 was carried by the plaintiff Liberty Mutual Insurance Company.

V.

That in February, 1942, the Contractors employed said defendant Leland T. McClees as a truck driver at Kaneohe, which employment continued from on or about February 26, 1942 [7] until April 15, 1942; that as a part of said claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942.

VI.

That on or about April 15, 1942 claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a "hitch hiker" by automobile to Honolulu; that on April 16, 1942 claimant was supposed to report back to work at Kaneohe but that he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck enroute to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment.

VII.

That thereafter, to wit, on or about June 8, 1942, said claimant filed a claim with the defendant Andrew R. Schmitz as said Deputy Commissioner against said Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter, to wit, on June 11, 1942, a hearing was held in the offices of said Andrew R. Schmitz on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance

Company; that [8] the proceedings and testimony at said hearing are more particularly set forth in the transcript of testimony of said hearing which will be produced at the hearing hereof and which is incorporated herein by reference.

VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit "A" and incorporated in this Complaint by reference.

IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects: [9]

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that "such transportation to work from Honolulu was available for employees other than those who lived at the Contractors' Hotel if they wished to use it" and that claimant "was using a conveyance provided by the employer for such purposes" is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that the accident occurred off the employer's premises; that the claimant at the time he sustained said

injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be [10] summoned to answer this Complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deem equitable and just.

Dated: Honolulu, T. H., August 5th, 1942.

LIBERTY MUTUAL INSUR-
ANCE COMPANY

HAWAIIAN DREDGING COM-
PANY, LIMITED

RAYMOND CONCRETE PILE
COMPANY

TURNER CONSTRUCTION
COMPANY

MORRISON-KNUDSEN COM-
PANY, INC.

J. H. POMEROY & CO., INC.

UTAH CONSTRUCTION COM-
PANY

W. A. BECHTEL COMPANY

JOHN E. BYRNE,

Plaintiffs,

By ANDERSON, WRENN &
JENKS

By (s) J. P. RUSSELL

Their Attorneys

Territory of Hawaii,
City and County of Honolulu—ss.

John P. Russell, being first duly sworn, on oath deposes and says: That he is associated with Anderson, Wrenn & Jenks, counsel for the plaintiffs named in the foregoing Complaint; that as such he is authorized to make and does make this verification for and on behalf of said plaintiffs; that he has read the foregoing Complaint, and to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay.

(S) J. P. RUSSELL

Subscribed and sworn to before me this 5 day of August, 1942.

[Seal]

(s) SAMUEL KAALOA

Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945. [11]

Official Correspondence Should be Addressed to the
Deputy Commissioner

UNITED STATES EMPLOYEES'
COMPENSATION COMMISSION

Longshoremen's and Harbor Workers'
Compensation Act

Commissioners
Jewell W. Swoffard
Chairman

Andrew F. Schmitz
Deputy Commis-
sioner

John M. Morin

In reply refer to

John J. Keegan

File No.....

Pacific District
407-408 Hawaiian Trust Building
Honolulu, T. H.

In the matter of the claim for compensation under
the Defense Bases Act.

LELAND T. McCLEES

Claimant

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES

Employer

LIBERTY MUTUAL INSURANCE COM-
PANY

Insurance Carrier

Compensation Order

AWARD OF COMPENSATION

Case No. DB-P-1-1834

Claim No. 176

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That Contractors, Pacific Naval Air Bases, is an association including Hawaiian Dredging Company, Ltd., Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Co., J. H. Pomeroy & Company, Inc., W. A. Bechtel Company, Utah Construction Company, and John E. Byrne doing business as Byrne Organization, and that this association conducts its business under the name of Contractors, PNAB;

That on April 17, 1942, the claimant herein was in the employ of the employer above named on Nuuanu Avenue, 100 yards before the Country Club Road in the Territory of Hawaii, in the Pacific Compensation District, established under the provisions of the Act approved August 16, 1941, (Public Law No. 208, 77th Congress); and that liability of the employer was insured by the Liberty Mutual Insurance Company;

that on said date claimant herein was riding in a truck owned by the Honolulu Construction & Draying Company on his way to work when the truck was sideswiped by a dairy truck and claimant sustained an injury to the left arm; [12]

that claimant herein was employed at Kaneohe

and lived in the employees' camp in that location. However, on April 15, claimant came to Honolulu to visit a friend to and including April 16, 1942. On the morning of April 17, 1942, he waited for the truck which the employer furnished for the purpose of picking up employees who lived at the Contractors' Hotel in Honolulu, and who were so transported to work at Kaneohe. Such transportation to work from Honolulu was available for employees other than those who lived at the Contractors Hotel if they wished to use it. Claimant herein was in the course of returning to work after a holiday in Honolulu and was using a conveyance provided by the employer for such purposes. Therefore, the injury arose out of and in the course of his employment;

that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer;

that the employer furnished claimant with medical treatment, etc., in accordance with section 7(a) of the said Act;

that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$2828.80;

that as the result of the injury sustained the claimant has been wholly disabled since the date of the accident, April 17, 1942, and is entitled to compensation for such disability and during continuation of such disability;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

The employer, Contractors, Pacific Naval Air Bases, and its insurance carrier, Liberty Mutual Insurance Company, shall provide medical treatment, etc., in accordance with the said Act; and shall pay compensation to the claimant, Leland T. McCless, at the rate of \$25.00 per week, beginning April 17, 1942, for and during continuation of total disability; Provided, that if such total disability is followed by partial disability, temporary or permanent, this award may be modified in accordance with the terms of the Act.

Given under my hand at Honolulu, T. H. this 8th day of July, 1942.

(s) ANDREW F. SCHMITZ

Deputy Commissioner

Pacific District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier at the last known address of each as follows:

Leland T. McClees, Contractors' Hotel, Honolulu, T. H.

Contractors, PNAB, Box 2459, Honolulu, T. H.
Liberty Mutual Insurance Co., 315 A & B
Building, Honolulu, T. H.

(s) ANDREW F. SCHMITZ

Mailed July 13, 1942. [13]

[Title of District Court and Cause.]

SUMMONS

To the Above Named Defendants:

You are hereby summoned and required to serve upon John P. Russell, associated with Anderson, Wrenn & Jenks, plaintiffs' attorneys, whose address is Bank of Hawaii Building, Honolulu, T. H., an answer to the Complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] (s) WM. F. THOMPSON, JR.

Clerk of Court

Dated: Honolulu, T. H., August 5, 1942. [14]

Marshal's Civil Docket 7-329

No. 2379

Court No. 477

Fees \$9.44

Expenses 1.76

Total \$11.20

UNITED STATES MARSHAL'S RETURN

I hereby certify that on the 5th day of August, A. D. 1942, I received the within Summons at the City and County of Honolulu, Territory of Hawaii, in my district and that I personally served the same upon the following named defendants as follows: On August 5, 1942, upon Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, by exhibiting the original and leaving with him a certified copy of the summons and complaint; On August 6, 1942, upon Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District by exhibiting the original and leaving with him a certified copy of the summons and complaint and further on August 6, 1942, I mailed a certified copy of said summons and complaint by registered mail, addressed to Francis Biddle, Attorney General of the United States, Washington, D. C.; On August 7, 1942, upon Leland T. McClees at Mokapu, Oahu, T. H., by exhibiting the original and leaving with him a certified copy of the summons and complaint.

Dated at Honolulu, T. H. this 7th day of August, A. D. 1942.

OTTO F. HEINE,

U. S. Marshal, District of
Hawaii.

By (s) EMMANUEL U. MOSES, JR.
Deputy.

[Endorsed]: Filed Aug. 5, 1942. [15]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now Andrew R. Schmitz, Defendant above named, by Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, and moves the Court to dismiss the Complaint herein upon the following grounds:

I.

That the facts alleged in said Complaint are insufficient to entitle Plaintiffs to the relief sought, or to any relief.

II.

That the facts alleged in said Complaint are insufficient to entitle Plaintiffs to a review by this Court of the proceedings before the Deputy Commissioner of the United States Employees' [17] Compensation Commission awarding compensation to Leland T. McClees, defendant above named.

III.

That it appears upon the face of the Complaint and the record of the proceedings and testimony at the hearing before said Deputy Commissioner, referred to and made a part of said Complaint, that the findings of fact made by said Defendant Andrew R. Schmitz are based upon substantial and competent evidence.

Wherefore, said Defendant prays that said Complaint herein may be dismissed.

Dated at Honolulu, Territory of Hawaii, this 30th day of September, 1942.

ANDREW R. SCHMITZ,

Deputy Commissioner of the
United States Employees'
Compensation Commission
for the Pacific Compensation
District,

By (s) ANGUS M. TAYLOR, JR.,

United States Attorney, District
of Hawaii.

His Attorney.

Receipt of a copy of the within Motion to Dismiss is hereby acknowledged this 30th day of September, 1942.

(s) J. P. RUSSELL for

ANDERSON, WRENN &
JENKS,

Attorneys for Plaintiffs.

[Endorsed]: Filed Sept. 30, 1942. [18]

[Title of District Court and Cause.]

STIPULATION

It Is Stipulated by and between the above-entitled parties, by their respective attorneys, that John C. Gray is now the duly qualified and acting Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, succeeding Andrew R. Schmitz, one

of the defendants above named, and that said John C. Gray may be substituted as a party defendant for the said Andrew R. Schmitz.

Dated at Honolulu, Territory of Hawaii, this 31 day of October, 1942.

(s) J. P. RUSSELL for
ANDERSON, WRENN &
JENKS,
Attorneys for Plaintiffs.

(s) ANGUS M. TAYLOR, JR.,
United States Attorney, Dis-
trict of Hawaii.
Attorney for Defendant
Deputy Commissioner.

[Endorsed]: Filed Oct. 31, 1942. [20]

[Title of District Court and Cause.]

ANSWER

The Defendant John C. Gray, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, by his attorney, Angus M. Taylor, Jr., United States Attorney for the District of Hawaii, for his answer to the complaint herein:

I.

Admits each and every allegation in the paragraphs of the complaint marked and numbered I, II, III, IV and VII.

II.

Denies each and every allegation contained in paragraphs of the complaint marked and numbered V and IX.

III.

Admits that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck enroute to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in [22] said Honolulu, at a point approximately twelve miles from his place of employment, and denies each and every other allegation contained in paragraph marked and numbered VI of the complaint.

IV.

Admits that after said hearing said Andrew R. Schmitz made and entered an award of compensation to the said claimant Leland T. McClees, a copy of which award is attached to said complaint, marked Exhibit "A" and incorporated in the complaint by reference, but denies each and every other allegation contained in paragraph marked and numbered VIII of the complaint.

V.

Further answering the whole of said Complaint this defendant alleges that said award of compensation made by said Andrew R. Schmitz to Leland

T. McClees was made and entered fully in accordance with law;

That the transcript of the testimony and transaction had before said Deputy Commissioner and exhibits produced before said Deputy Commissioner amply, fully and completely justify the finding of said Deputy Commissioner and the award of compensation based thereon; and

That this Court has no other alternative under the law but to sustain the finding of the Deputy Commissioner and the award of compensation made and entered by said Deputy Commissioner.

Wherefore, defendant demands judgment against the plaintiffs dismissing the complaint herein, together with [23] the costs and disbursements of this action.

Dated at Honolulu, Territory of Hawaii, this 31st day of October, 1942.

(S) ANGUS M. TAYLOR, JR.,
United States Attorney, Dis-
trict of Hawaii.

Receipt is hereby acknowledged of a copy of the within Answer this 31st day of October, 1942.

(s) J. P. RUSSELL for
ANDERSON, WRENN &
JENKS
Attorneys for Plaintiffs.

[Endorsed]: Filed Oct. 31, 1942. [24]

[Title of District Court and Cause.]

MOTION FOR DEFAULT

Come now Liberty Mutual Insurance Company, Hawaiian Dredging Company, Limited, Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Company, Inc., J. H. Pomeroy & Co., Inc., Utah Construction Company, W. A. Bechtel Company and John E. Byrne, plaintiffs above named, by their attorneys, Anderson, Wrenn & Jenks, and respectfully move that an order of default be entered by this Honorable Court declaring the defendant Leland T. McClees in default for failure to answer or otherwise plead to the complaint herein.

This motion is based upon the record and files herein and upon the affidavit of William F. Thompson, Clerk of the United States District Court in and for the Territory of Hawaii, hereunto attached.

Dated: Honolulu, T. H., November 4th, 1942. [26]

LIBERTY MUTUAL INSUR-
ANCE COMPANY
HAWAIIAN DREDGING COM-
PANY, LIMITED
RAYMOND CONCRETE PILE
COMPANY
TURNER CONSTRUCTION
COMPANY
MORRISON-KNUDSEN COM-
PANY, INC.

J. H. POMEROY & CO., INC.
UTAH CONSTRUCTION COM-
PANY

W. A. BECHTEL COMPANY
JOHN E. BYRNE,

Plaintiffs,

By ANDERSON, WRENN &
JENKS,

Their Attorneys,

By /s/ J. P. RUSSELL

Receipt of a copy acknowledged this 5 day of
Nov. 1942.

/s/ ANGUS M. TAYLOR, JR.

[Endorsed]: Filed Nov. 4, 1942. [27]

Territory of Hawaii,
City and County of Honolulu—ss.

AFFIDAVIT

William F. Thompson, being first duly sworn, on oath deposes and says: That he is the Clerk of the United States District Court for the Territory of Hawaii and as such has custody of all records filed in said Court; that he has examined the records in the above entitled cause and that there is no answer or other pleading filed by Leland T. McClees, one of the defendants, in Civil 477, entitled "Liberty Mutual Insurance Company, a Massachusetts corporation, et al, plaintiffs, v. Andrew R. Schmitz and Leland T. McClees, defendants.

That it appears from the return of the United States Marshal herein that the defendant Leland T. McClees was duly served by personal service on August 7, 1942 and that the summons required the said defendant to answer to the complaint within sixty days after such service; that no appearance or continuance on behalf of said Leland T. McClees has been filed in this cause.

Further affiant sayeth not.

/s/ WM. F. THOMPSON, JR.

Subscribed and sworn to before me this 4th day of November, 1942.

/s/ THOS. P. CUMMINS

Deputy Clerk, United States District Court, Territory of Hawaii. [Seal] [28]

[Title of District Court and Cause.]

FINDINGS AND CONCLUSION

In this case it is the duty of the court to examine the findings and compensation award of the deputy commissioner, together with the evidence upon which his award is based, and determine whether the award is in accordance with law. This is the sole ultimate question before the court.

There is no dispute about the essential facts in the case:

The claimant began work for Contractors, Pacific Naval Air Bases in defense base construction in January, 1942; [30] at the time injury occurred, on

introduction in England and the United States. Likewise, the interpretation of such law, coming up from a basis of harsh common law rules as applied to the relations between master and servant, has developed to the view that the relation of an employer and employee is a somewhat abiding status and not merely an implied contract to perform certain hours of work of a certain kind at a certain place. [32] That is what the Supreme Court of the United States has said in the case of *Cudahy Co. vs. Parramore*, 263 US. 481. The exact words of the Supreme Court are as follows:

“Workmen’s Compensation Legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes the capital; one for the sake of wages and the other for the sake of profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a casual connection between the injury and the business in which he em-

ploy the latter—a connection substantially contributory though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the economic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (*Mountain Timber Co. vs. Washington*, supra, P. 239) to escape condemnation as arbitrary, capricious or clearly unreasonable. Whether a given accident is so related or incidental to the business must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case.”

The supreme courts of numerous states from the Atlantic to the Pacific have in late years said the same thing in substance, meaning that industries must bear the burden of caring for workmen injured in industry, whether the injury results directly from working operations or in the [33] general course of and incidental to their employment. This does not mean that an employer is an insurer of the safety of an employee from the time he leaves his private abode to enter upon his assigned work until he returns thereto after the day's work is ended, nor while the employee is otherwise away from his work and going about his own affairs,

but, when an employee, under the circumstances surrounding a case like the one under review, quits his private affairs, prepares himself to enter upon his day's work and starts on his way thereto, and in doing so avails himself of means of transportation to the site furnished by the employer as incidental to such employment, it is clear that the compensation law is then operative upon both the employer and employee.

The supreme court of Montana, in *Wirta vs. North Butte Milling Company*, 210 Pac 332, says:

“The word ‘employment’ as used in the Workmen’s Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities regardless of whether the employee is actually engaged doing the thing he was employed to do * * * To say that plaintiff ‘ceased’ working for the defendant is not equivalent to saying that he severed the relation of employer and employee.”

The supreme court of Oregon, in *Lamm vs. Silver Falls Timber Co.* (286 Pac 527, 530), a case in which the court made a most exhaustive and profound study and analysis of many important decisions of late years, said:

“Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant at a moment when he was not performing manual labor for his employer,

does not necessarily prove that the accident did [34] not arise out of or in the course of employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that injury must have been inflicted during regular working hours.”

These general interpretations of compensation laws were established long before Congress made the Longshoremen’s and Harbor Workers’ Compensation Act applicable to persons employed at certain defense bases by the Act of August 16, 1941, 55 Stat. 622.

It is true that if we adopted the lines of reasoning in many earlier day cases it would be impossible to find that the injury in this case arose out of and in the course of employment, but the evolutions of time in better understanding of the purpose, scope and intent of compensation laws in their relation to industrial, economic and social conditions and affairs as affecting employer, employee and public interest, has given to these laws new and different interpretations which root deeper and broader than the views held in earlier cases.

In late years courts have found little difference between acts which read “out of and in the course of employment”, and those reading, “out of or in the course of employment”. They mean the same thing.

It is not believed that merely because some doctrines are more modern than others they are nearer justice and truth. But when a strong line of

later cases clearly show a definite trend dictated by sound reasoning and good conscience, indicative of universal benefit, we prefer to endorse and follow them, particularly when that is the mind of the United States Supreme Court, and we here hold (find) that upon the evidence and findings of the deputy commissioner, the compensation order did not violate any principle of law; [35] wherefore, in conclusion, the complaint is dismissed.

As a concluding note in this case we take occasion to say that this court joins in the rebuke so forcibly expressed recently by Judge Otis of the Federal Court of the Western District of Missouri with respect to the practice participated in principally by younger attorneys representing causes in behalf of the United States of America, in which they "demand" in their pleadings definite action on the part of the court, and then inform the court that it would be unsupportable and unthinkable that it not view the case in accordance with such demands.

There are many situations in which a litigant may properly demand of a court a thing which is a matter of clear and unquestioned right, but it is certainly unbecoming to demand action which in its nature should be based upon the discretion, wisdom or conscience of the court. Few things give quicker offense to a federal court than the implication that it wears a yoke of judicial servitude to the Government. Truly, a court owes much to the executive branch of the Government;

likewise it owes much to the legislative, but it owes much more to the judicial, and any demands of a dictatorial nature by an attorney representing an executive department, or a private litigant for that matter, should meet a sharp rebuke, for it must be remembered that all litigants stand before the court on an equal footing in their prayers for its decision.

Dated at Honolulu this 24th day of November, 1942.

(S) D. E. METZGER

Judge.

[Endorsed]: Filed Nov. 24, 1942. [36]

Form US-202

DB-P-1-1834

Claim 176

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Case No.

Insurance

Carrier's No.

United States Employees' Compensation

Commission

Office of Deputy Commissioner.....

Administering Longshoremen's and Harbor

Workers' Compensation Act

EMPLOYER'S FIRST REPORT TO DEPUTY
COMMISSIONER OF ACCIDENT OR OC-
CUPATIONAL DISEASE

(To be submitted in duplicate to Deputy Commissioner who will forward copy to Commission)

KA-529

Employer

1. Employer's name Contractors, Pacific Naval Air Bases (Individual or firm name).
2. Office address Pearl Harbor, Honolulu, T. H. (Street and number) (City or Town).
3. Nature of business Construction (Goods produced, work done, or kind of trade or transportation).
4. Insurance carrier..... 5. When was carrier notified? By this report.

Injured Person

6. Full name of injured person Leland T. McClees. His check No. 10933.
7. Address: Street and No. Contractors' Hotel. City or town Honolulu, T. H.
8. Sex Male. Age 28. Speak English? Yes. If not, what language?.....
9. Injured person's regular occupation Truck driver.
10. Was he injured in regular occupation? No. If not, occupation when injured On way to work.
11. Wages or average earnings per day, \$.....; month, \$225.00 (Include overtime, bonuses, etc.)
12. Working days per week 5½. Any other advantage? Mainland Contract Man.
13. Length of service in occupation 4 Months. Were full wages paid for day of injury? Yes until further notice.

The Injury

14. Place where injury occurred On Nuuanu Ave. 100 yds. before Country Club Rd. (Give place and name of vessel).
15. Name of foreman Mr. Hickey.
16. Date of accident or first illness April 17, 1942. (Month, day, year). Last day worked April 16, 1942 (Month, day, year).
17. When did you or your foreman first have knowledge of injury? Me on April 17, 1942.
18. Describe in full how alleged accident occurred, or how employee was exposed to alleged hazard: Injured person was on HC&D truck on way to work when the HC&D truck was side swiped by a Dairy truck which was proceeding to town. (Immediate cause of alleged injury or disease).
19. Machine, tool, or thing in connection with which accident or disease occurred Side of Truck (If machine, indicate part).

Nature and Extent of Injury

20. Nature of injury or occupational disease Injury to left arm (State exactly the part of the person affected and the character of injury or disease).
21. Was member or part of member lost? No.
22. Will injury probably result in serious head or facial disfigurement? No.
23. Did injury cause loss of time? Yes. If "yes", on what date? April 17, 1942 (Yes or no).
24. Has injured person returned to work? No. If "yes", on what date? (Yes or no)

25. Did you provide or authorize medical attention?
When? (Yes or no).
26. Physician Alsup Clinic (Name), 1154 Bishop
St. (Address).
27. Hospital St. Francis Hospital (Name), 2260
Liliha St. (Address).

Firm name Contractors, Pacific Naval Air Bases.

Dated April 21, 1942.

(Signed) GILBERT C. CHING,

First Aid Man.

(Official title).

Unless the above report shows that the injured is no longer disabled, then a supplementary report on "Employer's Supplementary Report of Injury" Form (US-211) must be made at the termination of disability, or at the end of fifteen days if disability had not then ended. [37]

Form US-207

DB-P-1-1834

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Case No.

Insurance

Carrier's No.

United States Employees' Compensation
Commission

Office of Deputy Commissioner

Administering Longshoremen's and Harbor
Workers' Compensation Act

NOTICE TO THE DEPUTY COMMISSIONER
THAT CLAIM WILL BE CONTROVERTED

(To be submitted in duplicate to Deputy Commissioner, who will forward copy to Commission)

Note.—This form must be completed and filed with the Deputy Commissioner on or before the 14th day after the employer has knowledge of the alleged injury or death, in all cases where the right of the injured to compensation is controverted.

1. Name of employer Hawaiian Dredging Co., Ltd., et al.
2. Office address: Street and No. P. O. Box 2459. City or town Honolulu.
3. Name of injured person Leland T. McClees.
4. Present address: Street and No. Contractors' Hotel. City or town Honolulu.
5. Date of alleged accident or first illness 4-17-42, 192....,M.
6. Nature of alleged accident or occupational disease injury to left arm.
7. When was notice of injury received from employer? 4-24-42, 192....
8. This case will be controverted for the following reasons:

- (a) For weekly wage?.....
- (b) For rate of compensation?.....
- (c) For period of disability?.....
- (d) If controverted for any other reason, state fully below:

Claimant was not in the course of his employment when injured and the accident did not arise out of his employment, and reserves the right to controvert for such other reasons as may later appear.

9. Do you believe the controversy can be settled by conference without the necessity for sworn testimony? Yes (Yes or no).

Name of Insurance Carrier Liberty Mutual Insurance Company.

(Signed)

C. F. WHITE/ec

Official title, Resident Manager.

Dated 5-19-42. [38]

Form US-215

Leave This Space Blank

Case No.

Insurance

Carrier's No. C92-8574

United States Employees' Compensation
Commission

Office of Deputy Commissioner Pacific.

Administering Longshoremen's and Harbor
Workers' Compensation Act

ANSWER OF EMPLOYER OR INSURANCE
CARRIER TO EMPLOYEE'S CLAIM FOR
COMPENSATION

LELAND T. McCLEES,

Claimant,

vs.

HAWAIIAN DREDGING CO.,

Employer,

LIBERTY MUTUAL,

Insurance Carrier.

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury.

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is denied that notice of injury was given employer as specified in application.

6. It is denied that applicant was permanently disabled to the extent stated in application.

7. It is denied that applicant was temporarily disabled for the period stated in application.

8. It is denied that the rate of wages as set forth in application is correct.

(Signed) C. F. WHITE/ec
C. F. WHITE.

Note.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim. [39]

Form US-203

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Case No. DB-P-1-1834

Insurance

Carrier's No.

United States Employees' Compensation
CommissionOffice of Deputy Commissioner Pacific District.
Administering Longshoremen's and Harbor
Workers' Compensation Act

EMPLOYEE'S CLAIM FOR COMPENSATION

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

Injured Person

1. Name of employee Leland T. McClees. Employee's check No. 10933.
2. Address: Street and No. Box 83, Lanikai. City or town.
3. Sex Male. Age 28. Married, single, widowed Single.
4. Do you speak English? Yes. Nationality American.
5. State regular occupation Truck Driver.
6. What were you doing when injured? Riding in truck.
7. (a) Wages or average earnings per day, \$225.00 mo. (Include overtime, board, rent, and other allowances.) (b) Per week, \$..... (c) Were you employed elsewhere during week in which

you were injured? (d) If so, state
where and when

8. Were you paid full wages for day of accident?
Yes.

Employer

9. Employer Contractors, PNAB.
10. Office address: Street and No. Box 2459. City
or town Honolulu.
11. Nature of business Construction.

The Injury

12. Place where injury occurred On Nuuanu Ave.,
100 yds before Country Club Dr. (Give place,
and name of vessel).
13. Name of foreman Mr. Hickey.
14. Date of accident or first illness, the 17th day
of April, 1942, at 6:15 o'clock a. m.
15. How did accident happen or how was occupa-
tional disease caused? Was on HC & D truck
on way to work when the truck was sideswiped
by a dairy truck which was proceeding to town.

Nature and Extent of Injury

16. State fully nature of injury or occupational
disease: Compound fracture of left elbow.
17. On what date did you stop work because of in-
jury? Yes.
18. Have you returned to work? (Yes or No.) No.
If "yes," on what date?, 192....
19. Does injury keep you from work? (Yes or No.)
Yes.
20. Have you done any work in period of disabil-
ity? No.

21. Have you received any wages since injury? No.
If so, from and to what date?
22. Has injury resulted in amputation? No. If so,
describe same
23. Did you request your employer to provide med-
ical attendance? No. Has he done so? No.
24. Attending physician: Name Dr. Alsup & Dr.
Cooper. Address Honolulu.
25. Hospital: Name St. Francis Hospital. Address
2260 Liliha St.

Notice

26. Have you given your employer notice of injury? (Yes or No.) Yes. When? April 17, 1942.
27. If such notice was given, to whom? Truck driver (Mitchell) told employer.
28. Was it given orally or in writing? oral.

I hereby present my claim to the Deputy Commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statements of facts.

(Signed by) **LELAND McCLEES,**
Claimant.

Mail address (mainland) K Cokato, Minn.

Dated June 8, 1942. [39A]

John W. Cooper, M.D.

Orthopaedic Surgery

353 Young Hotel Bldg.

Honolulu, Hawaii

Telephone 5318

June 10, 1942

Liberty Mutual Insurance Company

315 Alexander & Baldwin Building

Honolulu, T. H.

Re: Mr. Leland McClees, Emp. Kaneohe Naval Air Base, Kaneohe, Oahu.

Dear Sirs:

Since my last communication to you on May 19th, 1942, there has been a change of condition in Mr. McClees' case. Approximately a week after my letter was forwarded to you, Mr. McClees began to develop a pain in and about the left elbow which necessitated him being returned to surgery at St. Francis Hospital on May 27th. At this time it was found that there had developed a non-union of the fragments of the elbow joint and that there was some accumulation of purulent discharge. Furthermore the elbow, formerly without swelling, had become suddenly swollen and tender. On further exploration of the elbow at the time of second operation, it was found that some of the fragments failed to heal and had become necrotic, so were removed. The joint was then drained and the large skin defect was repaired by means of a skin plastic procedure.

Mr. McClees is once more up and about, and is beginning to use the left elbow again. The extreme fragmentation of the upper end of the ulnar bone may require a bone graft at some later date, however, this cannot be definitely established until a period of at least six months healing has been completed. It will be necessary to keep him at the hospital for an additional period of approximately one month, before discharging him to his home.

The skin plastic procedure at this time has healed quite satisfactorily, and as to disability, it may be found necessary to increase this to above 25%, however it is yet too early to make any such estimate at this time. On further questioning Mr. McClees regarding his travel, he insists that he was on his way to work and that he was injured during transit from Honolulu to his place of employment.

Hoping that this report may bring the progress of the injury to date, I remain,

Respectfully yours,

(s) JOHN W. COOPER, M.D.

JWC:lw [40]

In the matter of the claim for compensation under
the Defense Bases Act.

LELAND T. McCLEES,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR
BASES,

Employer

LIBERTY MUTUAL INSURANCE COMPANY
Insurance Carrier

Compensation Order

AWARD OF COMPENSATION

Case No. DB-P-1-1834

Claim No. 176

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That Contractors, Pacific Naval Air Bases, is an association including Hawaiian Dredging Company, Ltd., Raymond Concrete Pile Company, Turner Construction Company, Morrison-Knudsen Co., J. H. Pomery & Company, Inc., W. A. Bechtel Company, Utah Construction Company, and John E.

Bryne doing business as Bryne Organization, and that this association conducts its business under the name of Contractors, PNAB;

That on April 17, 1942, the claimant herein was in the employ of the employer above named on Nuuanu Avenue, 100 yards before the Country Club Road in the Territory of Hawaii, in the Pacific Compensation District, established under the provisions of the Act approved August 16, 1941, (Public Law No. 208, 77th Congress); and that liability of the employer was insured by the Liberty Mutual Insurance Company;

That on said date claimant herein was riding in a truck owned by the Honolulu Construction & Draying Company on his way to work when the truck was sideswiped by a dairy truck and claimant sustained an injury to the left arm;

that claimant herein was employed at Kaneohe and lived in the employees' camp in that location. However, on April 15, claimant came to Honolulu [41] to visit a friend to and including April 16, 1942. On the morning of April 17, 1942, he waited for the truck which the employer furnished for the purpose of picking up employees who lived at the Contractors' Hotel in Honolulu, and who were so transported to work at Kaneohe. Such transportation to work from Honolulu was available for employees other than those who lived at the Contractors Hotel if they wished to use it. Claimant herein was in the course of returning to work after

a holiday in Honolulu and was using a conveyance provided by the employer for such purpose. Therefore, the injury arose out of and in the course of his employment;

that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer;

that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act;

that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$2828.80;

that as the result of the injury sustained the claimant has been wholly disabled since the date of the accident, April 17, 1942, and is entitled to compensation for such disability and during continuation of such disability;

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

The employer, Contractors, Pacific Naval Air Bases, and its insurance carrier, Liberty Mutual Insurance Company, shall provide medical treatment, etc., in accordance with the said Act; and shall pay compensation to the claimant Leland T. McClees, at the rate of \$25.00 per week, beginning April 17, 1942, for and during continuation of total disabili-

ity; Provided, that if such total disability is followed by partial disability, temporary or permanent, this award may be modified in accordance with the terms of the Act.

Given under my hand at Honolulu, T. H. this 8th day of July, 1942.

/s/ ANDREW R. SCHMITZ
Deputy Commissioner
Pacific District

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the claimant, the employer, and the insurance carrier at the last known address of each as follows: [42]

Leland T. McClees, Contractors' Hotel,
Honolulu, T. H.

Contractors, PNAB, Box 2459, Honolulu,
T. H.

Liberty Mutual Insurance Co., 315 A & B
Building, Honolulu, T. H.

/s/ ANDREW R. SCHMITZ
Deputy Commissioner

Mailed July 13, 1942. [43]

United States Employees' Compensation Commission,
Before Andrew *F.* Schmitz, Deputy Commissioner,
Pacific District.

Case No.

LELAND T. McCLEES,

Claimant,

vs.

CONTRACTORS, PNAB, Employer, LIBERTY
MUTUAL INSURANCE COMPANY, Insurance Carrier,

Respondents.

TRANSCRIPT OF TESTIMONY AT
HEARING

Pursuant to notice and by stipulation this matter was heard before Andrew *F.* Schmitz, Deputy Commissioner, United States Employees' Compensation Commission, at Honolulu, T. H., on the 11th day of June, 1942, at 10 o'clock A.M.

Present:

Leland T. McClees, Claimant, in person;

C. F. White,

For Contractors, PNAB, Employer, and
Liberty Mutual Insurance Co., Insurance Carrier.

Reported by:

Carey S. Cowart,

Certified Shorthand Reporter,

Honolulu, Hawaii. [45*]

* Page numbering appearing at foot of page of original Reporter's Transcript.

Comm. Schmitz: This is a claim for compensation under the Defense Bases Act by Leland T. McClees against Contractors, PNAB, for personal injury by accident arising out of and in the course of his employment April 17, 1942, when he was on an HC&D Company truck on the way to work; the truck was sideswiped by a dairy truck that was proceeding to town and as a result of this accident McClees sustained a compound fracture of the left elbow; he has been disabled from work since the date of the accident.

Present at this hearing are the claimant Leland T. McClees, and C. F. White, representing the employer and insurance carrier, Contractors, PNAB, and Liberty Mutual Insurance Company.

May we have your denials and admissions?

Mr. White: Yes.

Comm. Schmitz: Will you state your admissions and denials for the record, Mr. White?

Mr. White: The employer and insurer in answer to the claim for compensation show:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application;

2. It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury, but it is admitted that the employment in which the employee was regularly engaged was subject to the Defense Bases Act. [46]

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the injury the employee was performing services growing out of and incidental to his employment.

5. It is admitted that notice of injury was given the employer, as specified in the application. In relation to that the employer's and insurer's answer on Form U.S. 215 should be corrected to show an admission rather than a denial.

6. It is denied that the applicant was permanently disabled to the extent stated in the application.

7. It is admitted that the applicant was temporarily disabled for the period stated in the application.

8. It is admitted that the rate of wages as set forth in the application is correct.

9. The employer and insurer contend that the employee was returning from a personal mission at the time the accident occurred.

That is all.

Comm. Schmitz: Mr. McClees, you filed this claim for compensation?

Mr. McClees: Yes.

Comm. Schmitz: You want the matter gone into to determine what compensation, if any, you are entitled to, is that it; fully gone into? [47]

Mr. McClees: Yes, sir.

Comm. Schmitz: Do you intend to sue the third party? Do you know what I mean?

Mr. White: The third party is either the HC&D, Hawaiian Construction and Draying Company, Ltd., the owner of the truck in which you were riding, and the operator also, and the dairy truck which collided with the HC&D truck and produced the injury.

Mr. McClees: Well, I don't know which carries insurance.

Mr. White: You have a common-law remedy against them. In other words, you can sue them.

Mr. McClees: The trucks are supposed to be insured, aren't they; they are hauling passengers.

Mr. White: If they were not insured you have the right to sue the corporation owners. Have you approached them at all on that?

Mr. McClees: I haven't seen them at all. Only the driver was up once, one day, that is all, but he didn't say anything about it.

Mr. White: You cannot do both. If you would like to receive compensation benefits——

Mr. McClees: The compensation doesn't include the hospital bills and that? I have to pay that out of the compensation? [48]

Mr. White: No. If you are awarded compensation you will also get your doctor and hospital bills paid, but you will lose your right then to go after the third party; your employer's insurance company will then become subrogated to your common-law rights against them.

Comm. Schmitz: Here is the situation, McClees. You were injured; you feel you were injured while in the course of your work and as a result of your work, and if that is so then you have a right under the Defense Bases compensation law to collect compensation as the law provides from the employer and insurance carrier. However, the law recognizes that such accidents might sometimes involve persons other than your employer. In your particular case you were working for Contractors, PNAB, and come within the scope of the Defense Bases jurisdiction. You were riding on a Honolulu Construction and Draying Company truck and you were injured because of the act of another owner's truck. So the question is: Do you want to come under the compensation law and take your compensation from your employer and its insurance carrier or is it your intention to eventually sue the Honolulu Construction and Draying Company and/or the dairy truck owner? You cannot do both.

Mr. McClees: I understand that.

Comm. Schmitz: If we dispose of this claim under the workmen's compensation law and you collect compensation under the Defense Bases compensation law, then your rights to go [49] after the Honolulu Construction and Draying Company or the dairy truck owner are lost to you, but they are turned over to Mr. White here representing the Liberty Mutual Insurance Company and Contractors, PNAB, and they in turn can go after these

people to recover damages on your behalf. Now the law further provides that if they do that, if they get more than what they are paying to you under this law, then they first deduct their reasonable expenses that they have incurred in that connection to recover but whatever is left over and above that is paid to you. So it is up to you to decide what you want to do. I presume that by filing this claim for compensation here that you decided that you wanted to take this step first, and if you are entitled to compensation then you naturally would subrogate or turn over your rights against the HC&D Company and the dairy truck owner, if there were any rights, to the Contractors, PNAB, and the insurance carrier.

Is it your intention to go ahead under the compensation law?

Mr. McClees: Well, I feel I should be entitled to that because I was going to work, riding to work, and was hurt.

Mr. White: It is not so much a matter——

Comm. Schmitz: It is up to you to decide which law you want to come under. If you come under the compensation law the matter can be heard and settled.

Mr. White: Under the compensation law you cannot [50] claim full wages; you can only claim up to twenty-five weeks, but against a third party you can show your loss in earnings as part of your damages; you can show your medical bills as part of your damages; you can show that you had a cer-

tain amount of pain and suffering as the result of it, and you can show that there may be permanent injuries for which you should be compensated. Then it becomes a matter for a jury to determine how much you should be awarded in damages, or if it is tried before a court without a jury—and there are no jury trials now, the court tries them now, then it would be up to the judge to determine what amount of money would adequately compensate you if they are liable to you. You will have to show that they are liable for your injuries.

Comm. Schmitz: I presume by filing this claim you intended to come under this law and let your employer and the insurer worry about the HC&D Company and the dairy truck owner, is that it?

Mr. McClees: That is the way I—

Comm. Schmitz: That is the way you want it?

Mr. McClees: Yes.

Comm. Schmitz: All right, we will go ahead with it then. Will you stand and be sworn? [51]

LELAND TIMOTHY McCLEES,

claimant herein, being first duly sworn, testified as follows:

Direct Examination

By Comm. Schmitz:

Q. What is your full name?

A. Leland Timothy McClees.

Q. Where do you live? A. Now?

(Testimony of Leland Timothy McClees.)

Q. Yes, now.

A. I live out at Lanakai, Box 83.

Q. What is your mainland address?

A. Cokato, Minnesota.

Q. For whom do you work? A. Now?

Q. Yes.

Q. (By Mr. White): Excuse me a minute.
What is this Free South?

A. That is where I stayed just before I came over here. My brother is there. My home is in Minnesota though.

Q. (By Comm. Schmitz) Who do you work for?

A. Out here now?

A. Yes. A. The Navy Contractors.

Q. Contractors, PNAB? A. Yes. [52]

Q. Were you working for them on April 17, 1942?

A. I was going to work; I was not working.

Q. You were on the payroll on that day?

A. Yes.

Q. When did you start to work for Contractors, PNAB?

A. January. I will swear now I don't know just when.

Q. January, 1942; that is close enough.

A. It was in January. I got over here the seventeenth; I think it was around the twentieth or twenty-second.

Q. Where was the location of your work?

A. I was a truck driver.

(Testimony of Leland Timothy McClees.)

Q. Truck driver? A. Yes.

Q. Where on the island were you working?

A. I was traveling all over the island; I was driving a dump truck.

Q. Where were you working out of?

A. What?

Q. Were you working out of a motor pool? Driving the dump truck, where did you haul from and where did you haul to?

Q. (By Mr. White) What job did you haul for?

A. Well, I hauled from there to a quarry.

Q. What job; whereabouts on the island was the job located? The job that you worked on.

Q. (By Comm. Schmitz) Were you working at Kahuku? A. Kaneohe. [53]

Q. Kaneohe? A. Yes.

Q. When you worked at Kaneohe did you live out there; did they have a camp there?

A. They just recently got one out there.

Q. Were you required to live in that camp?

A. Yes.

Q. How long had you been living in the camp before the accident? A. About six days.

Q. About six days? A. Yes.

Q. Prior to the time that you lived in the camp, where did you live? A. Contractors Hotel.

Q. Is that in Honolulu? A. Yes.

Q. Out on North King Street? A. Yes.

Q. When you lived at the Contractors Hotel on

(Testimony of Leland Timothy McClees.)

North King Street how did you get to your job at Kaneohe? A. HC&D trucks.

Q. You will have to speak louder.

A. HC&D trucks.

Q. Where would you go to get that transportation? Would [54] the trucks come to the hotel?

A. They would come to the hotel. That is right.

Q. Would you know which truck was assigned for the Kaneohe group; did they have identification marks?

A. They had two trucks that came there.

Q. You knew which one to get on?

A. Yes, I knew which one to get on.

Q. Was it always the same truck?

A. Same truck. I rode the same truck all the time.

Q. Same driver, same truck?

A. Same driver.

Q. When you went out to Kaneohe to live in the camp, about six days before the accident, then it was not necessary for you to have transportation; you were on the job, is that it?

A. Yes. They furnish transportation out there on their own trucks.

Q. They furnish transportation? A. Yes.

Q. How far from the camp to your job would it be? A. I imagine it is about a mile.

Q. Will you tell us now what happened on April 17, 1942? Describe the accident; tell us in your own words about it.

(Testimony of Leland Timothy McClees.)

A. Well, as far as I know, all I know, I was just sitting there and just all of a sudden it went like that—bang. [55]

Q. Did the truck turn over or were you struck by the other car?

A. I was struck by the iron bar on the truck, on the HC&D truck; an iron bar covers the truck entirely.

Q. Did the HC&D truck turn over?

A. No.

Q. Or did it run off the road?

A. No, it didn't tip over at all. It hit like that. I was just sitting there unconcerned.

Q. Now will you tell us how you happened to be on that truck rather than at the Kaneohe camp?

A. Well, I was in town on business and I stayed over night.

Q. Did you go to the Contractors Hotel to get the truck or did you meet it somewhere else?

A. Yes, I picked it up there where I stayed, at this friend's house.

Q. Then after you were struck by this iron bar, what happened? Were you taken back to Honolulu?

A. I was taken down here to the Emergency Hospital first.

Q. On Nuuanu Street?

A. It is down here somewhere. I don't know just where it is located.

Q. City and County Emergency Hospital, Punchbowl Street?

(Testimony of Leland Timothy McClees.)

A. Yes, City and County of Honolulu.

Q. What happened after that? [56]

A. From there they took me to St. Francis Hospital.

Q. You are now under the care of a doctor?

A. Dr. Cooper.

Q. Dr. Cooper? A. Yes.

Q. Have you received any compensation as yet?

A. I haven't had anything yet.

Comm. Schmitz: Your witness.

Cross Examination

By Mr. White:

Q. Leland, you have worked out at the Kaneohe job since about January 20, 1942?

A. I got over here the seventeenth and it was three or four days later.

Q. You came over as a laborer?

A. That is right.

Q. At how much a month? A. \$120.

Q. Then when were you raised to \$225; how long had you been here when you got the truck driver's job?

A. Just about a month when I got \$225.

Q. Sometime in February? A. Yes.

Q. Did you work all of the time at Kaneohe Station? A. All the time. [57]

Q. And up until six days before you were injured you had lived at the Kam Hotel?

A. Before.

Q. Before? A. Yes.

(Testimony of Leland Timothy McClees.)

Q. And then you were transferred to the Bird Farm camp, about one mile from the Kaneohe job?

A. That is right.

Q. In your truck driving operations at Kaneohe did you leave the Kaneohe reservation and go to some other point?

A. With the truck?

Q. With the truck.

A. No, I didn't.

Q. It was all right on the reservation?

A. It was all right on the reservation.

Q. What were your regular hours of work?

A. Eight to nine hours.

Q. Between what hours in the day; when did you start?

A. Seven in the morning.

Q. Seven in the morning?

A. Yes, to 4:30 in the afternoon.

Q. Quit at 4:30?

A. Yes.

Q. Did you work any overtime?

A. Yes. That is nine hours *and our* overtime. [58]

Q. Where was your truck kept with reference to the Kaneohe job?

A. Parked right on the lot.

Q. Parked right on the lot.

A. They have got a parking lot there and it is parked right on the lot.

Q. Do you take your meals at the Bird Farm camp?

A. I ate breakfast there. Instead of going out there I always ate down at the canteen.

Q. Did you go back there for lunch?

(Testimony of Leland Timothy McClees.)

A. No. I ate at the canteen.

Q. In the Navy?

A. In the Navy reservation, yes.

Q. Station. Where did you eat dinner? Where would you eat dinner or your supper?

A. I would eat it out there once in a while at the Bird Farm.

Q. At the Bird Farm? A. Yes.

Q. Did you have a day off on April 16 or did you take a day off, or what? A. Yes.

Q. Did you come into Honolulu? A. Yes.

Q. What time of the day did you come in? [59]

A. It was right around noon.

Q. Did you have a dentist appointment?

A. Well, I didn't have any appointment; I just came in to see about one.

Q. Did you go to see the dentist?

A. No, I didn't; he was busy.

Q. How did you spend the rest of the day, Mr. McClees?

A. Well, I met my brother; he is in the Navy here.

Q. In the Navy? A. Yes.

Q. I think you said that you spent the night at a friend's house? A. Yes.

Q. Where is that house located?

A. Out on River Road; it is at King Street.

Q. On South King Street or North King Street?

Q. (By Comm. Schmitz) North King and River? A. I think it is River.

(Testimony of Leland Timothy McClees.)

Q. Is it down near the Contractors Hotel or closer to town?

A. It is straight out—No, it is——

Q. Down by the Kalihi Stream?

A. Up King Street. Just about a block off of King Street, I guess.

Q. (By Mr. White) What was the name of your friend? A. What? [60]

Q. What was the name of your friend?

A. Martha Harding.

Q. Martha Harding? A. Yes.

Q. Is she also employed by the Contractors?

A. Yes, sir.

Q. At Kaneohe? A. Yes, sir.

Q. Mr. McClees, so far as your trip to Honolulu was concerned, that was entirely personal business, wasn't it? A. Yes, sir.

Q. You knew that there would be an HC&D truck carrying Contractors' employees pass by the stop where you got it? A. Yes, sir.

Q. You simply got on the truck?

A. Yes.

Q. You didn't pay any fare? A. No.

Q. Or ask anybody's permission to ride?

A. No.

Q. You say it was the same truck driver?

A. Same truck driver that always—same guy that always drove and picked us up at Kam School.

Q. Did he know you well enough to recognize you when he saw you? [61]

(Testimony of Leland Timothy McClees.)

A. Yes. Absolutely.

Q. He didn't raise any objection to you getting on the truck?

A. No, he didn't. He didn't say anything.

Q. Do you know what he does during the day?

A. Carpenter.

Q. Carpenter? A. Yes.

Q. Do you know whether or not he is an employee of Honolulu Construction and Draying Company, with reference to his truck driving, or an employee of the Contractors?

A. I don't know exactly. He lives over here.

(A discussion was had off the record.)

Q. (By Mr. White) Do you have any idea whether he was there or not?

A. I couldn't say. I don't know. That I don't know.

Comm. Schmitz: Couldn't we cover that point by getting a letter from the HC&D Company or from Contractors, PNAB, and include it in the record as an exhibit?

A. I know that he is paid for driving the truck by the Contractors.

Q. (By Mr. White) How do you know that?

A. Well, I heard him say so; that they get a dollar an hour.

Mr. White: As a matter of fact, he is not paid by the [62] Contractors for driving the truck; he is paid by HC&D as part of their rental agreement. But I can get a letter.

(Testimony of Leland Timothy McClees.)

Comm. Schmitz: That is probably a method of bookkeeping. Maybe the man himself doesn't understand it.

Mr. White: No. It is extra pay that they get from HC&D. They understand it.

Q. (By Mr. White) Did you have any companions with you on this trip to Honolulu; did you come over alone? A. I came over alone.

Q. And spent from noon until late afternoon with your brother and then went out to Miss Harding's house? A. Yes.

Q. Did your brother go with you?

A. No, he didn't.

Q. Was Mrs. Harding on the truck?

A. When it happened?

Q. When it happened. A. Yes.

Q. I believe it is true, Leland, isn't it, that at the time the accident happened you had your left arm, the arm that was injured, around someone's shoulder?

A. Just resting on her shoulder. The truck was crowded. My elbow was right by the bar, but it wasn't out over the side at all.

Q. All you contend is that you had been to Honolulu on personal business? [63]

A. Yes.

Q. And at the time the accident happened you were returning to the job? A. That is right.

Q. If it had not been for your personal trip to Honolulu you would have stayed at the Bird Farm that night? A. That is right.

(Testimony of Leland Timothy McClees.)

Q. And would have been given transportation from the Bird Farm to the job?

A. That is right.

Q. You were absent from the job on the sixteenth all day? A. That is right.

Q. Did you work on April 15?

A. No, I didn't.

Q. What did you do on April 15?

A. I was in and got some clothes; I had some laundry.

Q. Came into Honolulu?

A. Yes, sir. I didn't have all my stuff out there.

Q. Did you stay in Honolulu on the night of the fifteenth? A. Yes.

Q. Then actually you came over on the fifteenth?

A. Yes, that is right.

Q. And stayed two days?

A. Yes, that is right.

Q. Did you stay at Mrs. Harding's house on the night of the [64] fifteenth and the sixteenth?

A. Yes.

Mr. White: I think that is all.

Redirect Examination

By Comm. Schmitz:

Q. Mr. McClees, you say that *you at* the Kaneohe camp about six days before the accident. That would put you starting there on April 11 or 12?

A. Yes.

Q. Now when you went to work there were you told that you would be required to remain on the

(Testimony of Leland Timothy McClees.)

job all the time, seven days a week, or was there an arrangement for a day off each week?

A. Well, I had to ask the foreman for a day off.

Q. In other words, you worked seven days a week regular and they left it up to you, if you want a day off you ask the foreman for it?

A. Yes, you ask the foreman if you want a day off.

Q. Did you consult your foreman before you left the job on April 15?

A. Yes, I did.

Q. Did he give you permission to remain absent from work for a couple of days?

A. No, he didn't; not for two days he didn't.

Q. He gave you permission to remain absent for one day? [65] A. Yes.

Q. That was April 15? A. Yes.

Q. Did you go back to Kaneohe on the morning of April 16? A. No, I didn't.

Q. You remained in town? A. Yes.

Q. Is there any rule out there against taking a day off without permission?

A. Well, not only since this came in effect afterwards. Take two days off in a row, they fine you.

Q. If you take two days off in a row they fine you?

A. That has come in effect afterwards.

Q. That was made a rule after your accident?

A. That was after my accident.

(Testimony of Leland Timothy McClees.)

Q. On April 16, when you decided to remain in for another day, did you telephone your foreman?

A. No.

Q. Or take any steps to notify him?

A. No, sir.

Q. These trucks that take men from the Contractors Hotel out to Kaneohe, do they still take employees from the Contractors Hotel even though there is a camp at Kaneohe?

A. They still drive up there.

Q. There are still other men who come from the Contractors [66] Hotel to Kaneohe?

A. Yes, sir.

Q. This driver, you say, knew you?

A. Yes.

Q. And when you were waiting on the street for transportation he recognized you; did he stop voluntarily?

A. I talked to him. That is where he stops and picks up passengers.

Q. Did he talk to you?

A. Sure. He said, "Good morning."

Q. Did he ask you how you happened to be in town?

A. No; he didn't ask me no questions at all.

Q. Do they charge you for transportation?

A. No, sir; the transportation is furnished.

Q. Furnished free? A. Yes, sir.

Q. Now on the morning of the fifteenth, that is, when you came to Honolulu?

A. That is right.

(Testimony of Leland Timothy McClees.)

Q. Did you come to Honolulu by truck or by bus?

A. I came on the Navy truck out there.

Q. You came on the Navy truck? A. Yes.

Q. Contractors' truck?

A. Yes. I rode in with one of the fellows. [67]

Q. (By Mr. White) You said a Navy truck. Was it a Navy truck or Contractors' truck?

A. It is a Contractors' truck.

Q. (By Comm. Schmitz) One of those that has a sign on it, Navy Yard 50 and 41-73?

A. Yes.

Q. Is it possible to come away from that job and to go to that job by obtaining transportation on public conveyances; that is, are there any street-cars or busses running out there?

A. There is busses.

Q. There are busses that run out there?

A. Yes.

Q. Regularly? A. Yes, sir.

Q. I mean if you were in Honolulu and you wanted to get out to the job by seven o'clock in the morning.

A. You can take taxicabs or busses, transit busses.

Q. You could do that? A. Yes, sir.

Q. What is the bus fare?

A. Fifty cents. Taxicabs are more.

Q. This trip that you made to Kaneohe on the morning of April 16; that was for the purpose of returning to work?

(Testimony of Leland Timothy McClees.)

A. That was on the morning of April 17.

Q. April 17? [68]

A. Yes, sir, I was going to work.

Q. It was for no other purpose but that?

A. That is right.

Q. However, the trip into Honolulu on the fifteenth was for your own personal pleasure?

A. Yes, sir, that is right.

Q. Is there a rule by the Contractors that would require the men to obtain their own transportation by taxicab or bus from Honolulu to the job when they actually live out at Kaneohe and are visiting in Honolulu?

A. You have got to furnish your own transportation then; it is up to you, yes.

Q. In other words, I don't know whether I make myself clear to you, the men who live at the Contractors Hotel and are required to work in Kaneohe, they are given transportation by these trucks?

A. Yes, sir.

Q. However, the men who are living in Kaneohe ordinarily would not require that transportation—they are out there?

A. Sure.

Q. If they come to town, is there any rule that requires them to go back there by company truck or may they do as they see fit, or are they required to use public conveyances?

A. Well, you can do as you wish. You are not compelled to ride the trucks. You can take the bus or ride the trucks, [69] whichever you see fit.

Q. Are the drivers on these trucks required to

(Testimony of Leland Timothy McClees.)

stop on the street and pick up men who are living at Kaneohe?

Mr. White: If he knows what the rule is, let him state it. If he doesn't know, he cannot very well answer that, however.

Comm. Schmitz: He answered the other question. Would you read the first question?

Mr. White: He gave his personal opinion, but he didn't state whether there is any rule.

Q. (By Mr. White) Do you know whether there are any rules?

A. I don't know if there is any rule at all. No, I don't.

Comm. Schmitz: Mr. Cowart, will you go back there and read that testimony?

(The record was read by the reporter.)

Q. (By Mr. White) Leland, if you decided not to live at the Bird Farm camp or at the Kam Hotel, but decided to take an apartment in Waikiki, you would have to furnish your own transportation to and from work? A. That is right.

Q. Is that right? A. That is right.

Q. (By Comm. Schmitz) But if you lived at Kaneohe and came into town for a day off, then it is a matter of choice, you can furnish your own transportation or you can ride into [70] town on a company truck and back to the job on a company truck, if one is available?

A. Yes, that is right.

(Testimony of Leland Timothy McClees.)

Q. There are no rules by your employer that state otherwise?

A. I have never heard of no rules. They have never said anything—that you couldn't ride on them.

Q. (By Mr. White) So far you have been getting free transportation? A. Yes, sir.

Comm. Schmitz: Anything further?

Mr. White: No, I think that is all.

Mr. McClees: Do you want to read this letter?

Q. (By Mr. White) This is the letter from Dr. Cooper? A. Yes; that is right.

Comm. Schmitz: Do you have any other evidence to offer, Mr. White, regarding the attitude of the company with respect to furnishing transportation?

Mr. White: No. I don't think that is relevant at all. Mr. McClees admits that he was on a personal mission and was returning from that to the place of his employment.

There is one more question I would like to ask Mr. McClees.

Recross-Examination

Q. (By Mr. White) How were you dressed?

[71]

A. My work clothes.

Q. In your work clothes?

A. That is right.

Q. So you would not have had to stop at the Bird Farm camp that morning?

(Testimony of Leland Timothy McClees.)

A. No. I had my work clothes on. They are still out at the hospital.

Mr. White: That is all.

Comm. Schmitz: What is your pleasure?

Mr. White: The employer and insurer move that the claim be denied on the ground that the injury did not occur in the course of or arising out of his employment.

Comm. Schmitz: I feel in this case—It is true that he was on a personal mission on his way in, but he was on a job on his way out, and if the employer had specific rules prohibiting men from the use of company conveyances when they were in town——

Mr. White: This was not a company conveyance, Mr. Schmitz. It was a conveyance hired by the Contractors from and operated by an independent contractor.

Comm. Schmitz: For the purpose of bringing workmen to the job.

Mr. White: For the purpose of bringing workmen to the job. That is correct.

Comm. Schmitz: Do you deny that Mr. McClees' statement [72] is true when he says that men who are at work at Kaneohe may ride the trucks or public conveyances?

Mr. White: I construe that simply as Mr. McClees' personal opinion.

Comm. Schmitz: Are you able to controvert it? Are you able to disprove it?

Mr. White: No, the fact speaks for itself. He got a ride on a truck with a driver that he knew. Whether the driver knew that he no longer lived at the Kam Hotel or not, I don't know.

Comm. Schmitz: But what I mean, was this. If the company hasn't made any provision to prevent drivers from picking up men who do live——

Mr. White: Do you think they should?

Comm. Schmitz: It is not a matter for me to think one way or the other. I am asking you whether you want to bring anything specific on that point in the record. If you don't think it is necessary we will close the case on the record as it stands.

Mr. White: I don't think there is any evidence in the record now indicating one way or the other, whether or not there is a rule.

Comm. Schmitz: I think I am not making myself clear. I am asking you if you want an opportunity to bring such evidence to amplify the record. [73]

Mr. White: I don't think it is relevant to our contention that he was not in the course of his employment when the accident occurred.

Comm. Schmitz: I think the evidence will support a finding that claimant McClees was in the course of his employment on April 16 when he was returning to the job, and that he sustained personal injury by accident arising out of such employment. And I will, therefore, find an award in favor of the claimant. However, I would like to go further into the question of wages.

Will you stipulate to the wages as reported, at \$225 a month, or because of the shortness of the time in which he was employed do you want a further statement?

Mr. White: We will secure a wage statement on a man working 300 days or under.

Comm. Schmitz: The award will be delayed for that purpose. I suppose it will probably provide for the maximum compensation payment; it will be pretty close to it anyway, a truck driver's rate of pay.

Q. (By Mr. White) Seventy-five cents an hour?

A. That is what I was getting at the time I got injured. They raised it a couple of weeks afterwards.

Mr. White: That would be pretty close to the maximum.

Comm. Schmitz: All right. The hearing is closed.

(June 11, 1942, 10:55 A. M. The hearing was closed.) [74]

Territory of Hawaii,
First Judicial Circuit—ss.

I, Carey S. Cowart, certified shorthand reporter, do hereby certify that I reported in shorthand the testimony adduced and proceedings had on the hearing of the case of Leland T. McClees, claimant, versus Contractors, PNAB, before Andrew F. Schmitz, deputy commissioner, United States Em-

ployees' Compensation Commission; I further certify that the foregoing 30 pages is a full, true, and correct transcript of my shorthand notes taken as aforesaid.

Dated this 16th day of June, 1942.

(S) CAREY S. COWART,
Certified Shorthand Re-
porter. [75]

In the United States District Court for the
Territory of Hawaii

Civil No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al,
Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner
of the United States Employees' Compensation
Commission for the Pacific Compensation
District, and

LELAND T. McCLEES, claimant,
Defendants.

TRANSCRIPT

Of proceedings had in the above entitled cause, before the Hon. Delbert E. Metzger, Judge presiding, on October 8th and 24th, 1942; the Plaintiffs

appearing by J. P. Russell, Esq., of the law firm of Anderson, Wrenn & Jenks, and the Defendants being represented by Angus M. Taylor, Jr., United States Attorney.

October 8, 1942

10:04 a. m.

Mr. Taylor: Ready for the Government, Your Honor.

Mr. Russell: Ready for the plaintiffs, Your Honor; we represent the Liberty Mutual Insurance Company and the other plaintiffs.

The Court: This is a hearing on a Motion to Dismiss; to dismiss what?

Mr. Taylor: To dismiss the complaint previously filed; and may I make a statement at this time, if the Court [76] please. The Court has in its possession at the present time a certified copy of the transcript of record before the Deputy Commissioner Schmitz. It's my understanding that I might say that negotiations were had between Mr. Russell and a former assistant in my office Mrs. Gilbert, and I'd like at this time to offer into evidence and ask that it be made a part of the record this certified copy of the transcript of the original hearing with Mr. Schmitz presiding as Deputy Commissioner.

Mr. Russell: Well, Your Honor, may we have something to say on that. As I outlined to Mr. Taylor a few days ago we feel that the case is not yet at issue and therefore is not ready for what in effect amounts to a final hearing. In other

words, practically speaking we don't believe this transcript or this record of the hearing before the Deputy Commissioner should be made a part of the records or introduced before we're at issue; in other words before the Government has filed an answer either admitting or denying the facts alleged by us.

The Court: You regard this Motion to Dismiss as in the nature of a demurrer, is that it?

Mr. Russell: We regard it exactly as a demurrer, Your Honor; we have authorities to that effect, that the motion to dismiss is to be treated as a demurrer and is in effect a demurrer; and that brings us to the principal objection we have to the motion to dismiss; although grounds one and two are proper, ground three is not properly a part of the demurrer; ground three attempts to controvert the facts alleged in the petition and, as Your Honor well knows, it's probably one of the most well-established [77] principles in our law that you cannot controvert the facts on a demurrer, the facts are taken as admitted.

The Court: Yes. Well, I'm not familiar with your pleadings here; I haven't gone through them. Now, in the first instance, the complaint might have been filed by those who resisted a finding and order that was made by the commissioner.

Mr. Russell: That's right, Your Honor. The proceeding is in effect a proceeding under the Longshoremen's and Harborworkers Act; and that Act has been made applicable to certain defense

workers, and we're following the procedure set forth in the Longshoremen's and Harborworkers Act; that in itself is something new down here; we haven't had any case on that in a long time if at all; anyway, the situation is we filed a complaint, and under a very recent amendment of the Federal Rules of Procedure the Federal rules are made applicable to complaints of this nature, in proceedings of this kind, and under the Federal rules the proper way to attack defects of law is by motion to dismiss. The Government has filed a Motion to Dismiss, the first two grounds of which, as I say, are in effect a demurrer; the third ground, however, attacks the facts and in effect controverts the facts.

The Court: Well, that seems to me rather like an unusual procedure. Now, as I take it, there was a claim made against the employer and there was a hearing on that before the Commissioner.

Mr. Russell: Yes sir.

The Court: And this transcript that was referred to, that's a transcript of the proceedings in the hearing and the testimony and evidence there? [78]

Mr. Russell: Correct.

The Court: The commissioner then made a finding and an order in favor of the claim of the claimant. And now the next step then was the employer and insurance carrier coming into this Court with a complaint against that, which is in the nature of an appeal from the findings, is that it?

Mr. Russell: That's correct; it asks for an injunction staying the enforcement of the order and setting it aside, but it is an appeal, that's what it amounts to.

The Court: Now the Motion before the Court is to dismiss the appeal upon the ground that it isn't self-sustaining on the facts?

Mr. Russell: Correct.

The Court: Well, I think I've got a general outline of what it's about.

Mr. Russell: And we contend in effect that the third ground of this demurrer should be stricken because it does not admit the facts, and that is the office of a demurrer and is a well established rule applicable to demurrers that it must admit all of the facts pleaded in the petition.

The Court: Well now, that's the third point of the Motion?

Mr. Russell: Yes.

The Court (reading): "That it appears upon the face of the complaint and the record of the proceedings and testimony at the hearing before said Deputy Commissioner, referred to and made a part of said Complaint, that the findings of fact made by said Defendant Andrew R. Schmitz are based upon substantial and competent evidence."

[79]

Mr. Russell: You see, Your Honor, that is a denial of an allegation of our Complaint, namely, that any findings were not based upon substantial and competent evidence, that's the gist of our Com-

plaint; the Government has come in and denied that as a fact; that is properly embodied in an answer but not in a demurrer. I might say just preliminarily that we are skirmishing here upon a matter of procedure which in the final analysis is not terribly important, but this is the first case of this kind of several that will be before this Court and we wanted the Government to file an answer without that precedent set; I don't feel we can proceed to a final hearing, analysis of evidence and possibly introduction of further evidence before an answer by the Government; as for a motion to dismiss, that should be undertaken when the case is at issue.

Mr. Taylor: May it please the Court, I think if you'll examine the third ground of the Motion to Dismiss it will be apparent that it's not a denial of any facts; the facts are not taken up or discussed in any way; and I'd like to state this also, Your Honor, that a motion was filed and I have prepared here a voluminous brief on the matter to submit to Your Honor, and it was agreed between counsel that the matter would be submitted on memoranda of authorities for Your Honor's decision. Mr. Russell is quite correct when he tells Your Honor that he did mention the fact that he didn't particularly like my Motion to Dismiss being offered and there were several statements between counsel outside of court relative to the pleadings. I feel that the Motion is sound and that the Court should act on the Motion prior to any answer

by the Government. The Complainant here is asking Your Honor to act as a deputy [80] commissioner and try the case anew, which the overwhelming weight of authority frowns on; and if there was any evidence to substantiate the findings of this commissioner certainly his decision will be upheld. Now, I don't care to argue the case this morning; I prepared this brief which I intended to file this morning and serve Mr. Russell with a copy, and it was my understanding he was thoroughly familiar with that agreement and that it was satisfactory to him and after the briefs had been submitted if Your Honor desired to question counsel further we could appear and argue the case further or answer any questions or submit additional evidence if desired. I feel that that procedure should be followed, and that was what I was prepared to do this morning; the original copy of the brief is here to file this morning, and the additional copy will be in court in just a few minutes.

Mr. Russell: Your Honor, we're not quite as much at cross purposes as it appears. I agreed with counsel that we would submit it on briefs, and we are prepared to answer counsel's brief as soon as an answer is filed narrowing the issues. The whole purpose behind these Federal rules of procedure is to narrow the issues and get down to the issues before the court. We contend that the Government has jumped one stage in attempting to analyze the facts and the facts are not before the Court; there has been no answer to see which facts we plead are

admitted by the Government. It can simply be handled by the Court passing the Motion to Dismiss and requiring the Government to file an answer, and the briefs can be filed simultaneously as far as I'm concerned; I mean, we admit, Your Honor, that [81] at this particular hearing we're not going to bring any further evidence in and that the matter must be decided upon the evidence before the commissioner; therefore we're not asking for a trial; counsel is wrong in that statement.

The Court: Well, just what is the idea of you gentlemen, then, of the purpose of this supposed hearing this morning?

Mr. Russell: Well, I'm opposing the Motion to Dismiss, and under the rules the Court can pass decision upon the Motion to Dismiss until the final hearing. I'm asking that the Government be required to file an answer before it files a brief analyzing the facts and the evidence, because as yet there is no evidence before the Court.

The Court: Well, it kind of resolves itself just as a submission of this Motion to Dismiss with the trial of that issue to be had by way of briefs and later argued. At the present time you both concede, from anything that the Court has heard from either or both of you, the Court isn't in a position to act on it now; is that what you're telling the Court, that you want to brief the thing in argument and point out substantial reasons, such as they appear to counsel on both sides, as to the action the Court should take, that that's something to be done in the future?

Mr. Russell: Basically I think that's right, Your Honor, but I'm objecting to the procedure followed by the Government. In other words, they've brought in first a demurrer in which they deny the facts alleged in the petition; well, that cannot be done, for one thing; they have not filed any answer and they're asking for a final hearing without any answer being filed; those are the two [82] objections; those are purely formal procedure, but we're starting in on something new here and we ought to start in on the right form.

The Court: Well, my reaction is this: that the movant who says that the facts alleged in the complaint or any one issue, to entitle the plaintiff to relief sought or to any relief, should at this time present to the Court his argument and reasons on that and not just dump it in the lap of the Court to figure out whether that statement is correct or not by an examination not only of the complaint itself but as to the whole law surrounding it. Now you come in with a motion to dismiss the complaint on the first ground; are you ready with your arguments?

Mr. Taylor: Yes, Your Honor; I have prepared here a brief for Your Honor; I'm not prepared this morning to argue the case orally because it was my understanding with opposing counsel that I would submit this brief to you; I did know that he had some objection to the Motion, but there have been no formal objections made to the Motion except his informal statement that he does not like the way

we're proceeding; but in the brief Your Honor will find that I have attempted to clear up the whole situation. In opposing counsel's complaint, he refers on page 5 "that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to the said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit 'A' and incorporated in this Complaint by reference." Now, this award and the transcript of the testimony taken at that hearing on file is certainly evidence that should come before Your Honor in deciding this Motion; and I also [83] understood that that was agreed that that would be made a part of the record as referred to in the Complaint and also in the Motion to Dismiss; and as I understood this hearing this morning was to identify properly the certified copy of the transcript, to submit the brief which has been prepared by the Government and give Mr. Russell any reasonable time he'd like to answer and let Your Honor take any action he sees fit based upon the Motion to Dismiss, then after that I'm prepared to argue the matter.

Mr. Russell: I have no objection to any of that if the Government will file an answer before introducing evidence. We propose that we would introduce the record at the hearing; this is not a proper hearing to introduce outside evidence.

The Court: That is undoubtedly true. This is a motion to dismiss on the grounds of insufficiency in the complaint itself——

Mr. Russell (int.): Yes.

The Court: And while I think that you ought to be prepared and ready to point out to the Court at this time, still if you have between you agreed to submit that on briefs, if you think it's too voluminous to present orally to the Court, I'll entertain your briefs. Are they ready now?

Mr. Taylor: Yes, Your Honor, I'm ready to file mine with Your Honor this morning and serve Mr. Russell with a copy. Naturally he would not have an answer since he has not been served. This brief contains 19 pages and covers the situation fully, and this certainly is a proper time to file it. Whether Your Honor wants to rule on my motion to make the transcript a part of the record—it has been filed with the Clerk but it has not been made a part of [84] the pleadings.

The Court: I should doubt if it would be appropriate to bring in the transcript or any matter of evidence in it at this time, on the face of this motion and the nature of the motion as I construe it. I would say that the motion should be considered first, and then if we go to the issue of the merits, that's the time then to bring in the facts.

Mr. Taylor: Very well, Your Honor. I respectfully note an exception to Your Honor's ruling relative to the transcript; and the Government will file this brief with Your Honor this morning and serve Mr. Russell with a copy, and I think it will be sufficient, but if it's not Your Honor can say we'll set it down for a date certain for oral argument.

Mr. Russell: Your Honor, we can very simply do that if the Government will answer and the trial proceed in an orderly course. He can't very well file a brief on the facts until he has made an answer.

The Court: No; I don't want any brief on the facts; I want a brief pertaining to the Motion.

Mr. Taylor: Yes, Your Honor, that's what the brief is on, pertaining to the Motion; and the Government does not desire to answer at this time until action has been taken on the Motion.

Mr. Russell: Well, counsel has stated to the Court that the brief discusses the Motion to Dismiss. Our only recourse would be to strike the brief.

The Court: All right, if you think it should be struck, if you're of that mind and the nature of it is such you can act on that. I get the impression we're approaching the thing rather awkwardly. You're ready with your brief now, Mr. Taylor? [85]

Mr. Taylor: Yes, Your Honor.

The Court: And how much time do you think you want? If you had agreed to brief it I don't see why you couldn't brief this Motion without hearing what your adversary has to say in support of it; for that matter I don't see why——

Mr. Russell (int.): I can't do it for that reason, because counsel's brief discusses facts that are not in the Complaint.

The Court: Well, that I don't know.

Mr. Russell: Well, he has assured the Court that it does.

The Court: Well, how much time do you think you want?

Mr. Russell: Oh, I can do it in say ten days.

The Court: Well, 10 days would be to the 19th; is that all right—Monday the 19th of October?

Mr. Russell: Yes, that would be all right.

Mr. Taylor: Satisfactory with the Government, Your Honor.

The Court: Are you going to want an answering or reply brief?

Mr. Taylor: Well, I intend to file this brief this morning; whether Mr. Russell intends to answer this brief and also to brief that portion relative to his ideas on the Motion to Dismiss, I don't know.

The Court: All right; we won't go into that now, then. The Court will receive your brief at this time and give Mr. Russell and his clients 10 days to reply to that; and we'll see what develops by then; make it by noon of October 19th, Mr. Russell.

Mr. Russell: Very well.

(Adjourned—10:26 a. m.) [86]

October 24, 1942

10:30 a.m.

The Court: This is up on a Motion to Dismiss which was argued—

Mr. Taylor (int.): Yes, Your Honor.

The Court (continuing): And then submitted on briefs. The Court has listened to the argument—rather out of order—prior to reading the briefs; but

having carefully considered both matters is of the mind that the Motion to Dismiss should be denied, that the movant should be given reasonable time to answer to the Petition.

Mr. Taylor: May it please the Court, I'd like to respectfully except to Your Honor's ruling. I ask for one week to answer.

Mr. Russell: One week is agreeable to us.

The Court: Well, we had just as well make it—is Saturday week all right?

Mr. Taylor: All right, Your Honor.

The Court: That would be October 31st. When the answer is in——

Mr. Taylor (int.): The reason I asked for a week, Your Honor; ordinarily I'd say we would file the answer on Monday, but I don't think there are any further data or authorities to submit to Your Honor, and Mr. Russell and I have agreed that we would then submit the matter as previously agreed on the briefs already submitted, but there might be something he'd like to add or that I'd like to add.

The Court: Yes. Well, you were moving the other day to introduce the transcript of the evidence before the [87] Commissioner. That was deferred and will be until your answer is in.

Mr. Taylor: Yes, Your Honor.

The Court: Then that Motion will be entertained at any time; and I think I can say in advance that the matter will be allowed in.

Mr. Taylor: Very well, Your Honor.

The Court: Then when you get your answer in and we get the matter introduced in the record that seems appropriate, that's all.

Mr. Taylor: Yes, Your Honor.

Mr. Russell: Then it will be just submitted on the briefs previously filed.

The Court: I think I'll entertain it then, on the matter that is before me on the briefs; as to the merits of the main contention, there's one thing as I see it and that is the question as to whether the Commissioner was correct and had sufficient facts for his findings and conclusions in law that the injury resulted from and during the course of the man's employment.

Mr. Russell: That's the only issue, Your Honor; it's a comparatively simple case, I think.

The Court: Possibly.

Mr. Russell: Compared to a couple we have coming up.

The Court: Possibly.

I Hereby Certify the foregoing to be a full and accurate transcript of my shorthand notes taken in the above entitled cause.

/s/ OLAF OSWALD

Official Court Reporter [88]

From the Minutes of the United States District
Court for the Territory of Hawaii

Thursday, October 8, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, of the firm of Anderson, Wrenn and Jenks, counsel for the plaintiff herein, and also came Mr. Angus M. Taylor, Jr., counsel for the defendant Andrew R. Schmitz.

This case was called for hearing on a motion to dismiss.

Mr. Taylor asked that the certification submitted by the defendant Schmitz be considered as a part of the record.

Mr. Russell made an objection to the acceptance of the certification in evidence. Mr. Russell stated that the motion to dismiss is a demurrer and made a statement as to the procedure to be followed and asked that the defendant file an answer.

Mr. Taylor made a statement as to the procedure and stated that he will have no evidence and will submit briefs.

The offer of the certification was denied at this time and an exception noted.

The brief for the defendant was submitted.

The plaintiffs were allowed to October 19, 1942 at 10 a.m. to file a reply brief. [89]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, October 24, 1942

[Title of District Court and Cause.]

On this day came Mr. Angus M. Taylor, Jr., Acting United States District Attorney, for the defendant Andrew R. Schmitz, and also came Mr. J. P. Russell of the firm Anderson, Wrenn & Jenks, counsel for the Liberty Mutual Insurance Co., and this case was called for hearing on Motion to Dismiss.

The Court denied the Motion to Dismiss. An exception was noted by Mr. Taylor. The Court ordered that the defendant have to October 31, 1942 within which to file an answer. [90]

From the Minutes of the United States District
Court for the Territory of Hawaii

Saturday, November 7, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, of the firm of Anderson, Wrenn & Jenks, counsel for the plaintiffs herein, and also came Mr. Angus M. Taylor, Jr., Acting United States Attorney, appearing for John C. Gray, who is at present Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District.

This case was called for hearing on a motion for default.

Mr. Russell and Mr. Taylor made statements.

The Court ordered that this matter be continued to Tuesday, November 10, 1942 at 10 a. m. [91]

From the Minutes of the United States District
Court for the Territory of Hawaii

Monday, November 16, 1942

[Title of District Court and Cause.]

On this day came Mr. J. P. Russell, counsel for the plaintiff herein, and also came Mr. Angus M. Taylor, Jr., Acting United States Attorney, appearing for the defendant herein. This case was called for hearing on the offer of the certification and transcript in evidence.

On motion of Mr. Russell the certification and transcript was admitted in evidence as plaintiff's Exhibit No. 1, marked and ordered filed. [92]

In the United States District Court for the
Territory of Hawaii

Civil Action No. 477

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts corporation, et al.,

Plaintiffs,

vs.

ANDREW R. SCHMITZ, Deputy Commissioner
of the United States Employees' Compensation
Commission for the Pacific Compensation Dis-
trict, and LELAND T. McCLEES, claimant,
Defendant.

JUDGMENT

Pursuant to the written Findings and Conclusion
of this Court filed herein on the 24th day of No-
vember, 1942, and the Plaintiff having failed to
establish his right to the relief prayed for in the
Complaint filed herein on the 5th day of August,
1942,

It Is Hereby Ordered that the Complaint be and
the same is hereby dismissed.

Dated: Honolulu, T. H., this 29th day of De-
cember, 1942.

(Seal) (S) WM. F. THOMPSON, JR.,

Clerk, United States District
Court for the Territory of
Hawaii.

Let the foregoing judgment be entered:

(s) D. E. METZGER,

Judge, United States District Court for the Territory of Hawaii.

[Endorsed]: Filed Dec. 29, 1942. [94]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice Is Hereby Given that Liberty Mutual Insurance Company, a Massachusetts corporation, one of the plaintiffs above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment dismissing the complaint in the above entitled action entered on December 29th, 1942.

Dated: Honolulu, T. H., December 30th, 1942.

ANDERSON, WRENN &
JENKS,

Attorneys for Plaintiffs above
named.

By (s) J. P. RUSSELL.

Received copy this 31st day of Dec. 1942.

(s) EDWARD A. TOWSE,

For: U. S. District Attorney.

[Endorsed]: Filed Jan. 2, 1943. [96]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Liberty Mutual Insurance Company, a Massachusetts corporation, as principal, and Royal Indemnity Company, a New York corporation, as surety, are held and firmly bound unto the above named defendants in the sum of \$250.00; to which payment well and truly to be made we bind ourselves and our respective successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of December, 1942.

Whereas, Liberty Mutual Insurance Company, one of the plaintiffs above named, has prosecuted its appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment entered in said cause by the United States District Court for the District for the Territory of Hawaii on the 29th day of December, 1942, dismissing the complaint filed by the above named plaintiffs against the defendants. [98]

Now, Therefore, the condition of this obligation is such that if the above named plaintiff shall prosecute its appeal to effect and pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the Appellate Court may award if the judg-

ment is modified then this obligation to be void, otherwise to remain in full force and effect.

LIBERTY MUTUAL INSUR-
ANCE COMPANY,

Principal.

By (s) CHARLES F. WHITE, JR.,

Its General Agent.

(Seal) ROYAL INDEMNITY COM-
PANY,

Surety.

By (s) WM. P. CRANDALL,

Attorney in Fact.

Approved as to Form and Sufficiency of Surety.

(s) EDWARD A. TOWSE,

For: U. S. District Attorney.

(s) D. E. METZGER,

Judge of the above entitled
Court.

[Endorsed]: Filed Jan. 2, 1943. [99]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated by and between the Liberty Mutual Insurance Company, appellant, and John C. Gray, appellee, through their respective attorneys, that the record on appeal shall consist of the following:

1. Complaint and Summons, filed on August 5, 1942;
2. Motion to Dismiss, filed on September 30, 1942;
3. Stipulation for Substitution of Parties, filed October 31, 1942;
4. Answer of John C. Gray, Deputy Commissioner, filed October 31, 1942;
5. Motion for Default and Affidavit of Clerk, filed November 4, 1942;
6. Findings and Conclusion, filed November 24, 1942;
7. The following original Exhibits:
 - (a) Employer's report, Form 202, April 21, 1942;
 - (b) Notice that claim will be controverted, May 19, 1942; [101]
 - (c) Employee's Claim for Compensation, Form 203;
 - (d) Answer of Employer;
 - (e) Letter of Dr. J. W. Cooper, June 10, 1942;
 - (f) Copy of Award, July 8, 1942;
 - (g) Transcript of testimony before Deputy Commissioner;
8. Reporters' Transcript for October 8 and October 24, 1942 (in duplicate);
9. Clerk's minutes;
10. Judgment, December 29, 1942;
11. Copy of Notice of Appeal;
12. Copy of Bond;
13. Copy of this Stipulation.

Dated: Honolulu, T. H., December 31st, 1942.

LIBERTY MUTUAL INSUR-
ANCE COMPANY,

Appellant.

By ANDERSON, WRENN &
JENKS,

Its Attorneys.

By (s) J. P. RUSSELL.

JOHN C. GRAY,

Deputy Commissioner, Ap-
pellee.

By (s) EDWARD TOWSE,

For: U. S. District Attorney.

[Endorsed]: Filed Jan. 2, 1943. [102]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT
COURT, TO TRANSCRIPT OF RECORD
ON APPEAL.

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 102 inclusive are a true and complete transcript of the record and proceedings had in said court in the above-entitled cause, as the same remains of record and on file in my office, and that

the costs of the foregoing transcript of record are \$36.25 and that said amount has been paid to me by the appellant.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said court this 20th day of January, A. D. 1943.

(Seal)

WM. F. THOMPSON, JR.,

Clerk, United States District
Court, Territory of Hawaii.

[103]

[Endorsed]: No. 10355. United States Circuit Court of Appeals for the Ninth Circuit. Liberty Mutual Insurance Company, a Massachusetts Corporation, Appellant, vs. John C. Gray, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, Appellees. Transcript of Record Upon Appeal from the District Court of the United States for the Territory of Hawaii.

Filed January 26, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10355

LIBERTY MUTUAL INSURANCE COMPANY,
a Massachusetts Corporation,

Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner of the
United States Employees' Compensation Com-
mission for the Pacific Compensation District,
and LELAND T. McCLEES, Claimant,
Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Comes now the appellant above named and hereby designates the points on which it intends to rely upon on this appeal, as follows:

1. The Court erred in ordering the complaint dismissed inasmuch as the claimant's injuries did not arise from his employment nor were they incurred while he was acting within the scope or course of his employment.

2. The Court erred in refusing to grant a mandatory injunction restraining and enjoining defendants from enforcing said award of compensation and in refusing to reverse, annul and set aside same.

3. The Court erred in finding that the compensation order and award of compensation were in ac-

cordance with law, and in ordering dismissal of the complaint on that ground, inasmuch as the evidence fails to support the finding and judgment in this, that at the time he sustained his injuries the claimant was not at his place of employment, but was on a personal venture having no connection with his employment and was not acting in the course of his employment.

4. The finding and judgment are contrary to the evidence and contrary to law, inasmuch as the testimony shows without conflict that the accident in which the claimant was injured occurred off the employer's premises when the employee was riding in a conveyance selected by him and at a place selected by him and not by his employer, exposing himself to hazards not incident to his employment.

5. That the findings and judgment are contrary to the evidence and contrary to law inasmuch as the testimony shows that the accident in which the claimant was injured was not the result of any industrial risk, but arose from a common peril to which the public generally is exposed.

THEODORE HALE,

CARROLL B. CRAWFORD,

Attorneys for Appellant.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF
THE RECORD NECESSARY FOR CON-
SIDERATION ON APPEAL.

Comes now the appellant above named and hereby designates as necessary for consideration on appeal the entire certified transcript of record on appeal in the above entitled matter, and hereby designates for the printed record on appeal said entire transcript of record.

THEODORE HALE,
CARROLL B. CRAWFORD,
Attorneys for Appellant.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF MAILING

State of California,
City and County of San Francisco—ss.

E. J. MacDonald being first duly sworn, deposes and says: That at all times herein mentioned her business address was and still is 111 Sutter Street, San Francisco, California; that at all times herein mentioned she was and still is a citizen of the United States and a resident of the City and County of San Francisco, State of California, over the age of eighteen years and not a party to the above entitled proceeding:

That on the 6th day of February, 1943, she deposited in the United States mail at San Fran-

cisco, State of California, a true copy of the annexed Appellant's Statement of Points To Be Relied Upon On Appeal and of Appellant's Designation of Parts of the Record Necessary for Consideration on Appeal, enclosed in a sealed envelope with postage fully prepaid, addressed to:

ANGUS M. TAYLOR, JR.,

United States Attorney, Dis-
trict of Hawaii, Honolulu,
T. H.

That there is delivery service and regular communication by mail between the said place of mailing and the place addressed.

E. J. MacDONALD.

Subscribed and sworn to before me this 6th day of February, 1943.

MARIE H. STANLEY,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires November 20, 1943.

[Endorsed]: Filed Feb. 6, 1943. Paul P.
O'Brien, Clerk.

No. 10,355

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY
(a Massachusetts corporation),
Appellant,

VS.

JOHN C. GRAY, Deputy Commissioner
of the United States Employees' Com-
pensation Commission for the Pacific
Compensation District, and LELAND
T. McCLEES,
Appellees.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

THEODORE HALE,
26 O'Farrell Street, San Francisco,
CARROLL B. CRAWFORD,
111 Sutter Street, San Francisco,
Attorneys for Appellant.

FILED

MAR 30 1943

Subject Index

| | Page |
|--|------|
| Statement as to Jurisdiction..... | 1 |
| Summary of Pleadings | 4 |
| Statement of the case..... | 9 |
| Purpose of claimant in visiting Honolulu..... | 10 |
| Status of truck in which claimant was riding when injured | 10 |
| Note as to typographical error..... | 12 |
| Specification of Errors | 12 |
| Summary of Argument | 13 |
| Argument | 14 |
| I. Principles of law governing this action..... | 14 |
| a. The going and coming rule and exceptions thereto.. | 15 |
| II. Decisions of the federal courts construing provisions of the Longshoremen's and Harbor Workers' Act in- volved herein constitute ample authority for reversal of the judgment | 16 |
| III. A list of typical American compensation cases arising in many states supports with practical unanimity ap- pellant's contention that the judgment herein should be reversed | 20 |
| Conclusion | 24 |

Table of Authorities Cited

| Cases | Pages |
|--|--------|
| American Mutual Liability Ins. Co. v. Curry, 187 Ga. 342, 200 S. E. 150..... | 22 |
| Ayers v. Hoage, 63 Fed. (2d) 364..... | 17, 19 |
| Bozant v. Federal Underwriters Exchg., 159 S. W. (2d) 973 (Texas) | 20 |
| Cudahy v. Parramore, 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366 | 12 |
| Denver and Rio Grande W. R. Co. v. Ind. Comm., 72 Utah 199, 269 Pac. 512..... | 23 |
| Employers' Liability Assur. Corporation v. Monahan, 91 Fed. (2d) 130 | 17 |
| Fazio v. Cardillo, 109 Fed. (2d) 835..... | 17 |
| Fowler v. Louisiana Highway Comm., La., 160 So. 813 | 21 |
| Goldsworthy v. Schreiber, Wis., 250 N. W. 427.... | 21 |
| Indemnity Ins. Co. of N. A. v. Hoage, 61 App. D. C. 173, 58 Fed. (2d) 1074..... | 19 |
| Lamm v. Silver Falls Timber Co., 133 Or. 468, 286 Pac. 527 | 16 |
| Lepow v. L. K. M., 32 N. Y. S. (2d) 498..... | 17 |
| Madore v. New Departure Mfg. Co., 104 Conn. 709, 134 Atl. 259, 261 | 19 |
| McWilliams Dredg. Co. v. Henderson, 36 Fed. Supp. 361... | 17 |
| Mich. Transit Corp. v. Brown, 56 Fed. (2d) 200, 202..... | 18, 19 |
| Schultz v. Beaver Products, 229 N. Y. Supp., affirmed 166 N. E. 326 | 22 |
| Southern Shipping Co. v. Lawson, 5 Fed. Supp. 321..... | 17 |
| Speaks v. Hoage, 78 Fed. (2d) 208, cert. den. 296 U. S. 574, 80 L. Ed. 405..... | 17 |
| Travelers Ins. Co. v. Santos, 55 S. W. 868 (Texas)..... | 20 |

| | Pages |
|---|-------|
| Voehl v. Indemnity Ins. Co., 288 U. S. 162, 77 L. Ed. 676.. | 15 |
| Walker v. Hyde, 43 Idaho 625, 253 Pac. 1104..... | 23 |
| West Penn. Sand and Coal Co. v. Norton, 95 Fed. (2d) 498 | 17 |

Codes and Statutes

| | |
|---|--------|
| Act of September 13, 1888, c. 1015, Sec. 13 (25 Stat. 479) as amended U. S. C. Title 8, Sec. 282 (deportation of Chinese) | 3 |
| Defense Bases Act of August 16, 1941 (Public Law 208, 77th Congress; 42 U. S. C. A. 1651, 1654)..... | 2 |
| Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927: | |
| 33 U. S. C. A. Sec. 902, subd. 2..... | 14, 17 |
| 33 U. S. C. A. Sec. 918..... | 4 |
| 33 U. S. C. A. Sec. 921..... | 2, 4 |
| Rules of Civil Procedure, Sec. 81 (a) 6..... | 3 |
| 28 U. S. C. A., Title 28, Sec. 225, par. (a)..... | 4 |

No. 10,355

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY
(a Massachusetts corporation),

Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner
of the United States Employees' Com-
pensation Commission for the Pacific
Compensation District, and LELAND
T. McCLEES,

Appellees.

Upon Appeal from the District Court of the United States
for the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

This is an appeal in an injunction proceeding brought by Liberty Mutual Insurance Company against Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, Claimant, under the provisions of the Longshoremen's and Harbor Workers' Act of March 4,

1927 (33 U. S. C. A. 921) made applicable to certain defense base workers outside the continental limits of the United States by the Defense Bases Act, approved August 16, 1941. (42 U. S. C. A. 1651-1654.) This latter act, "Public Law 208—77th Congress—Chapter 357, 1st Session," is printed in the appendix hereto.

The complaint was filed in the District Court of the United States for the Territory of Hawaii on August 5, 1942. (R. 12.) Subsequent to the filing of the complaint Deputy Commissioner Andrew R. Schmitz was succeeded by John C. Gray. Thereafter and on October 31, 1942, it was stipulated by and between the respective parties hereto that the said John C. Gray "may be substituted as a party defendant for the said Andrew R. Schmitz." (R. 22.) The action therefore comes to this Court on appeal with John C. Gray, as said Deputy Commissioner, named as one of the appellees instead of Andrew R. Schmitz.

In paragraph I of the complaint (R. 6) the following allegation is made:

"That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U. S. C. A., Secs. 1651-1654) (Defense-Bases Act), and particularly by reason of Section 1653 (b), reading as follows:

'Judicial proceedings provided under Sections 918 and 921 of Title 33 in respect to a compensation order made pursuant to Sections 1651-1654 of this title shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose

compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs' ”;

“That in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended (49 Stat. 921, 33 U. S. C. A., 'Sec. 921.)’ ”

The complaint also alleges that the plaintiff at all times mentioned therein was a Massachusetts corporation, duly licensed to do an insurance business in Hawaii (R. 7); sets forth the legal status and identity of the other plaintiffs; alleges that Andrew R. Schmitz is the Deputy Commissioner for the Pacific Compensation District; that the said Leland T. McClees is a claimant under said Defense Bases Act (R. 8), and that the plaintiff Liberty Mutual Insurance Company, at all times in the complaint mentioned was the compensation carrier for the other plaintiffs named therein. (R. 8.)

The Rules of Civil Procedure, Sec. 81 (a) 6, as amended by order of the Supreme Court made on December 28, 1939, to become effective on September 1, 1940, read as follows:

“(6) These rules do not apply to proceedings under the Act of September 13, 1888, C. 1015, Sec. 13 (25 Stat. 479) as amended, U. S. C., Title 8, Sec. 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's

and Harbor Workers' Compensation Act of March 4, 1927, C. 509, Secs. 18, 21 (44 Stat. 1434, 1436), U. S. C. Title 33, Sec. 918, 921, except to the extent that matters of procedure are provided for in that Act."

The Court has jurisdiction of this appeal under Par. (a), Sec. 225, Title 28, U. S. C. A., and by virtue of the notice of appeal and bond filed January 2, 1943. (R. 97-98.)

SUMMARY OF PLEADINGS.

The first four paragraphs of the complaint have been summarized under the heading "Statement as to Jurisdiction". Beginning with paragraph V (R. 8) the complaint alleges that in February, 1942, the Contractors (Contractors, Pacific Naval Air Bases) employed claimant Leland T. McClees as a truck driver at Kaneohe, which employment continued from February 26, 1942, until April 15, 1942; that as a part of said claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942. (R. 8.)

That on April 15, 1942, claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a "hitch-hiker" by automobile to Honolulu, that on April 16, 1942, claimant was supposed to report back to work at Kaneohe but that

he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942, claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck en route to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment. (R. 9.)

Paragraph VII of the complaint (R. 9) alleges that thereafter on June 8, 1942, said claimant filed a claim with the Deputy Commissioner (then Andrew R. Schmitz) against the Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter on June 11, 1942, a hearing was held in the offices of the Deputy Commissioner on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance Company. (The transcript of this hearing, which was incorporated in the complaint by reference, was subsequently introduced in evidence as Plaintiff's Exhibit No. 1. (R. 95.) It is printed in full in the record herein, pages 51 to 78.)

Paragraphs VIII and IX of the complaint printed verbatim are as follows:

“VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland

T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit 'A' and incorporated in this Complaint by reference. [For 'Award of Compensation' see Transcript of Record herein, pages 14-17.]

IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects:

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that 'such transportation to work from Honolulu was available for employees other than those who lived at the 'Contractors' Hotel if they wished to use it' and that claimant 'was using a conveyance provided by the employer for such purposes' is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that the accident occurred off the employer's premises; that the claimant at the time he sustained said injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result

of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be summoned to answer this complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deem equitable and just.” (R. 10-11.)

The answer of the Deputy Commissioner denies and puts in issue all controversial allegations of the complaint, and, by way of further answer, alleges that the award was fully in accordance with law, that the transcript of testimony and exhibits before the Deputy Commissioner amply justify his findings and the award based thereon; that, therefore, the Court has no other alternative than to sustain the Award of Compensation; wherefore defendant demands dismissal of the Complaint with costs.

At the final hearing in the District Court it was agreed between the Court and plaintiff's counsel (defendant's counsel not dissenting), that the only question before the Court for decision was “whether the Commissioner was correct and had sufficient facts for his findings and conclusions of law that the injury resulted from and during the course of the man's employment.”

STATEMENT OF THE CASE.

At the hearing before the Deputy Commissioner claimant was the only witness. The more material parts of his testimony were in substance as follows:

Leland T. McClees, the claimant, began work as a dump truck driver for Contractors Pacific Naval Air Bases at Kaneohe base, near Honolulu, about January 20, 1942. (R. 58-59.) At first he lived at the Contractors Hotel on North King Street, Honolulu, but about six days before the accident in question, which occurred on April 17, 1942, the claimant went to live at Bird Farm Camp, about a mile from his place of employment. (R. 60.)

When he lived at the Contractors Hotel in Honolulu claimant was taken to and from his job at Kaneohe base by trucks of the Honolulu Construction and Draying Company. After he went to Bird Farm Camp to live his employers furnished transportation from the camp to claimant's job. (R. 60.)

Claimant worked seven days a week except as an occasional day off might be granted by his foreman on request. Such a request was made by claimant and the foreman gave him permission to be absent for one day. (R. 69.) On April 15th claimant went into Honolulu, overstayed his leave one day and was injured when returning to Kaneohe base on the morning of April 17th in a truck of the Honolulu Construction and Draying Company which was sideswiped by a dairy truck. (R. 52.)

Purpose of claimant in visiting Honolulu.

Questioned by the Deputy Commissioner, claimant testified (R. 64) that he arrived in Honolulu about noon, attempted to arrange a dental appointment but found the dentist busy; claimant met his brother, who is in the Navy, was with his brother during the afternoon and spent the night at the house of a friend, also employed by the Contractors at Kaneohe (R. 65); that his trip to Honolulu was entirely on personal business.

Questioned by C. F. White, representing the employer and compensation carrier (R. 67), claimant said that he came alone to Honolulu; that he spent the time from noon to later afternoon with his brother and then went to the house of a friend, unaccompanied by his brother; admitted that he came to Honolulu on purely personal business; that he was returning to his job at the time of the accident; that if it had not been for his personal trip to Honolulu he would have stayed at Bird Farm Camp that night (R. 68) and would have been given transportation from Bird Farm to his job; that he came into Honolulu to get clothes and laundry; that he came over on the 15th, stayed two days and spent the night of the 15th and 16th at his friend's house.

Status of truck in which claimant was riding when injured.

Testimony as to the ownership and management of the truck in which claimant was injured developed nothing to indicate that it belonged to his employer or was operated by claimant's fellow servants. The truck

belonged to the Honolulu Construction and Draying Company.

When he lived at the Contractors Hotel in Honolulu previous to going to Bird Farm Camp, claimant had ridden in the same truck in which he was riding when injured; two such trucks called at the Contractors Hotel every morning to take employees living there to the Kaneohe base; it did not appear that these trucks ever carried employees from Honolulu to Bird Farm Camp, or were used for any other purpose than for taking Kaneohe base employees from the Contractors Hotel to their place of employment. Nor does it appear that claimant had any authorization from any one to use this method of transportation back to his job. From past experience he knew where he could board the truck and did so upon his own initiative. (R. 65.) He was acquainted with the driver and paid him no fare.

Claimant came to town on a Naval Contractors' truck, having a sign on it "Navy Yard 50 and 41-73". He stated that there was no rule compelling men visiting in town to go home by company truck; that, to the contrary, men living at Kaneohe who visited Honolulu were obliged to provide their own transportation back; there is bus and taxicab service between Honolulu and Kaneohe. (R. 72.) Also, claimant said employees who came into Honolulu for a day off could ride back on a company truck—if they could find one; that he had heard of no rule to the contrary. However, there was no testimony tending to show that the employer knowingly permitted such practice or was aware of it,

much less that it was accorded employees as a privilege. (R. 73-74.)

Note as to typographical error.

(Note: In the Transcript of Record herein, page 30, next to last line from bottom of page, in the excerpt from the opinion in *Cudahy Co. v. Parramore*, 263 U. S. 418, 44 S. Ct. 153, 68 L. Ed. 366, the word printed *casual* should read *causal*.)

SPECIFICATION OF ERRORS.

1. The Court erred in finding that claimant's injuries arose from his employment inasmuch as claimant, when injured, was engaged in matters personal to himself and in no sense a part of any duty required by his employer.

2. The Court erred in finding that claimant's injuries were incurred while acting within the scope of his employment inasmuch as claimant was off duty when injured, was not on his employer's premises and was not acting 'or supposed to be acting under the orders of his employer.

3. The Court erred in refusing to annul the order and award inasmuch as they are not supported by the evidence and are therefore in excess of the jurisdiction of the Court.

4. The Court erred in refusing to grant plaintiff a mandatory injunction restraining defendants from enforcing said award of compensation.

5. The Court erred in refusing to annul the award and grant plaintiff a mandatory injunction on the ground that claimant's injuries were not industrial in character but resulted from a risk to which all users of the highways are exposed.

SUMMARY OF ARGUMENT.

Appellant's argument is divided into three sections:

I. *Principles of law governing this action.* In this section is set forth the basic law defining "injury" as the word is used in the Longshoremen's and Harbor Workers' Compensation Act, and (a) the "Going and Coming Rule," as defined by the Supreme Court of the United States, followed by citations illustrating exceptions to the general rule.

II. *A review of Federal Court cases in point herein.* Cases cited in this section construe the terms "arising out of the employment" and "in the course of the employment" as used in the Act rather than discuss specific instances of employees injured while going to or coming from work.

III. *A list of cases directly in point.* This section is a review of specific cases from many jurisdictions involving employees injured when going to or coming from work under circumstances analogous to those of the case at bar.

ARGUMENT.

I.

PRINCIPLES OF LAW GOVERNING THIS ACTION.

In the opinion of the District Court (R. 33) these words appear:

“In late years courts have found little difference between acts which read ‘out of and in the course of employment’ and those reading ‘out of or in the course of employment’. They mean the same thing.”

Whether the foregoing statement be true or not as an abstract proposition, it assuredly has no application to the case at bar. The rights, duties and liabilities herein arise from and are governed by the Longshoremen’s and Harbor Workers’ Act, of which Section 2 (2) (33 U. S. C. A. 902, Subd. 2) reads as follows:

“(2) The term ‘injury’ means accidental injury or death arising out of *and* in the course of employment, and such occupational disease,” etc.

In the instant case the claimant’s injuries could not have arisen in the course of his employment for he had been absent from his job for two days when injured. Neither could they have arisen out of it, for, when off duty, on business or pleasure for himself and off his employers’ premises he was injured by an instrumentality neither belonging to nor controlled by the employer, namely, a truck of the Honolulu Construction and Draying Company, a conveyance selected by claimant himself upon his own authority and initiative.

a. The going and coming rule and exceptions thereto.

This is a case involving what is known in compensation law as the "Going and Coming Rule." In a case arising under the Longshoremen's Act the Supreme Court of the United States has stated this rule in these words:

"The general rule is that the injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment."

Voehl v. Indemnity Ins. Co., 288 U.S. 162, 77 L. Ed. 676.

As to the character of exceptions to the rule, the *Voehl* case itself is a marked example. *Voehl*, the claimant, was an employee of a refrigerating plant in the City of Washington, having charge of maintenance and operation of the company's warehouse. While his regular hours were from 7:30 A.M. to 5:30 P.M. six days a week, he was in a sense on duty all the time, being subject to call upon the happening of an emergency. It was a part of his contract that at such times he should be paid a specified hourly wage from the time he left his home till he returned thereto, also he received five cents a mile for use of his automobile.

Summoned to work on a Sunday, *Voehl* was injured in an automobile accident. The Supreme Court held

this to be an exception to the Going and Coming Rule and reversed the lower court which had held the accident not compensable.

Another and common type of exception to the Going and Coming Rule is found in *Lamm v. Silver Falls Timber Co.*, 133 Or. 468, 286 Pac. 527. In this case the claimant, a logger, was injured while returning from town to the logging camp on his employer's logging train. It was the custom of the camp and one of the privileges accorded employees as a condition of their employment that they might ride back and forth at will on the train. The award in claimant's favor was affirmed.

Employees carried to their jobs by their employer's trucks or other vehicles as a condition of the employment constitute another exception of this type.

There are, of course, other types of exception to the Going and Coming Rule—such, for example, as that arising from the existence of a special hazard, as a railroad track, to which the employee must expose himself as he approaches or leaves his employer's premises—but they are not relevant to the case at bar.

II.

DECISIONS OF THE FEDERAL COURTS CONSTRUING PROVISIONS OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT INVOLVED HEREIN CONSTITUTE AMPLE AUTHORITY FOR REVERSAL OF THE JUDGMENT OF THE DISTRICT COURT.

Before discussing analogous cases which have arisen throughout American jurisdictions generally it is ap-

propriate to call attention to the decisions of Federal Courts construing provisions of the Longshoremen's and Harbor Workers' Act involved herein.

As stated on a preceding page, Section 2 of the Act, 33 U. S. C. A. 902 (2), reads as follows:

"The term 'injury' means accidental injury or death arising out of *and* in the course of employment". (Italics ours.)

As said in *McWilliams Dredg. Co. v. Henderson*, 36 Fed. Sup. 361, and *West Penn. Sand & Coal Co. v. Norton*, 95 Fed. (2d) 498, both construing this Act: "To be compensable death must both arise out of and in the course of employment," and the phrase "arise out of employment" requires a causal connection between the conditions of work and the accident. It is necessary in order to make an award that the risk causing the injury or death be one incident to the employment.

Fazio v. Cardillo, 109 F. (2d) 835;

Speaks v. Hoage, 78 F. (2d) 208; cert. den. 296 U. S. 574, 80 L. Ed. 405;

Ayers v. Hoage, 63 F. (2d) 364;

Southern Shipping Co. v. Lawson, 5 Fed. Sup. 321.

The Longshoremen's and Harbor Workers' Act was patterned after the New York Act and it has been held that, in construing the Longshoremen's Act, decisions of the New York Courts construing the New York Act may be consulted. (*Employers' Liability Assur. Corporation v. Monahan*, 91 F. (2d) 130.)

In *Lepow v. L. K. M.*, 32 N. Y. S. (2d) 498 (1942), the Court said:

“The Workmen’s Compensation Law is not applicable to an injury which arose through a danger or hazard disassociated from and not inherent in the nature of the employment as its source and to which the employee would have been equally exposed apart from the employment. This conclusion is not affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed. * * * It must be one of the risks connected with the employment flowing therefrom as a natural consequence and directly connected with the work.”

In *Mich. Transit Corp. v. Brown*, 56 Fed. (2d) 200, 202, the Court in a single paragraph summarizes many decisions construing the phrases “in the course of” and “arising out of”:

“It is sufficient to say that an injury is received ‘in the course of’ the employment when it comes while the workman is doing the duty which he is employed to perform. It arises ‘out of’ the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises ‘out of’ the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to

the work, and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Mich. Transit Corp. v. Brown, 56 Fed. (2d) 200, 202, *supra*.

And in another Federal Court case it was said on the same subject:

"An injury 'arises out of' the employment within the meaning of the Compensation Act when it occurs in the course of the employment and as the result of a risk involved in or incidental to the employment or to the conditions under which it is required to be performed. The mere fact that the injury is contemporaneous or coincident with the employment is not a sufficient basis for an award. *Indemnity Insurance Co. of North America v. Hoage*, 61 App. D. C. 173, 58 F. (2d) 1074, 60 Wash. Law Rep. 450; *Madore v. New Departure Mfg. Co.*, 104 Conn. 709, 134 A. 259, 261. In the *Madore Case* the court said: 'Before he can make a valid award, the trier must determine that there is a direct causal connection between the injury whether it be the result of accident or disease, and the employment. The question he must answer is: Was the employment a proximate cause of the disablement, or was the injured condition merely contemporaneous or coincident with the employment? If it was the latter, there can be no award made.' "

Ayers v. Hoage, 63 F. (2d) 364, 365, *supra*.

III.

A LIST OF TYPICAL AMERICAN COMPENSATION CASES ARISING IN MANY STATES SUPPORTS WITH PRACTICAL UNANIMITY APPELLANT'S CONTENTION THAT THE JUDGMENT HEREIN SHOULD BE REVERSED.

Among the state cases applicable herein is *Bozant v. Federal Underwriters' Exchange*, 159 S. W. (2d) 973 (Tex.). In that case the repair shop employee, after completing his day's work and starting to the bus line, decided to ride to the street on which his home was located, on one of the employer's trucks, at the suggestion of the repair shop superintendent and was injured in a collision. The Court stated the general rule that injuries received while riding to and from work are not compensable and held that in order for injuries resulting from risks of streets and highways, to be compensable, the employee at the time of the injury must be actually engaged in the performance of some particular duty of his employment, or must be on some substantial mission of his employer's in the course of employment which subjects him to such peril. The Court said:

"This rule is based on the premise that one injured upon the streets or highways while going to or from his work, suffers his injury as a consequence of risks and hazards of the streets and highways to which all members of the public are alike subject and not as a consequence of risks and hazards having to do with and originating in the work or business of the employer."

The Court cites to the same effect the case of *Travelers' Ins. Co. v. Santos*, 55 S. W. (2d) 868 (Texas), where the claimant had obtained permission

from the foreman of the company to ride to Eagle Pass, Texas, in a truck belonging to the employer. He was denied compensation for injuries sustained while returning to work on the truck.

In *Fowler v. Louisiana Highway Comm.*, 160 So. 813 (La.), the employer, as an accommodation to its employees, allowed them to ride into town from their place of employment on a company truck and to return on the truck when the weekend was over. The men were employed in road work some thirty to forty miles away from the home of the deceased employee. Some employees used their own cars to get to and from the place of employment. There was no express understanding that the employees without transportation would be furnished the same. The use of the truck over weekends grew into a regular practice known to all. It was a personal matter to the employees whether to go into town over the weekend. The deceased rode in from the labor camp on Saturday and in trying to jump on the moving vehicle, on Monday morning on its return trip, was run over. The Court held:

“It would require a stretching of the law beyond ‘the limit’ to hold, in view of these and other established facts in the case, that deceased’s employment began when he reached the roadside to board defendant’s truck en route to Tensas Parish.”

To the same effect is *Goldsworthy v. Schreiber*, 250 N. W. 427 (Wis.), another case where the facts were

even more favorable to the claimant than in the instant case. In that case the employer had given his employees to understand that on weekends they could ride into town from the camp where they stayed, on a company truck free of charge, returning on Sunday evening with the truck. They were not required to go into town but could stay at the camp over the weekend if they wished, although they had to cook their own food in such case. There was bus transportation available and some men used their own cars, receiving no extra pay for doing so. Deceased was paid by the day. The evidence showed that the employer had been asked about transportation by some of the employees and told them they could ride on the truck if they desired. The Court said that the question was whether such transportation was furnished pursuant to contractual obligation or as a mere accommodation to the employees and as an inducement to them to enter the employment, and held that it was the latter. The Court, in denying compensation, emphasized that the men were at liberty to remain in the camp and were not furthering the interests of the employer in going into town for their own personal ends.

Among other cases in point herein are:

American Mutual Liability Ins. Co. v. Curry
(Ga.), 200 S. E. 150 (replete with citations);

Schultz v. Beaver Products, 229 N. Y. S., affirmed 166 N. E. 326 (employees permitted to ride into town on company truck; employee held not in course of employment when killed);

Walker v. Hyde (Idaho), 253 Pac. 1104 (employee killed while trying to jump on truck to return to his job during noon hour; *Held*, not in course of employment);

Denver & Rio Grande W. R. Co. v. Ind. Comm. (Utah), 269 Pac. 512; (employee used employer's truck to get to section house, for the purpose of being taken from there to job; was riding on employer's truck, but not over a permissible route).

Many other cases, most of them cited in the foregoing opinions, could be added to this list by way of cumulative authority.

CONCLUSION.

In closing, appellant particularly directs attention to the fact that the claimant McClees, was not only engaged in a personal venture at the time he was injured, but that, far from traveling in obedience to any order or direction of the employer, McClees actually was one day overdue on the return to his place of employment. (R. 69.)

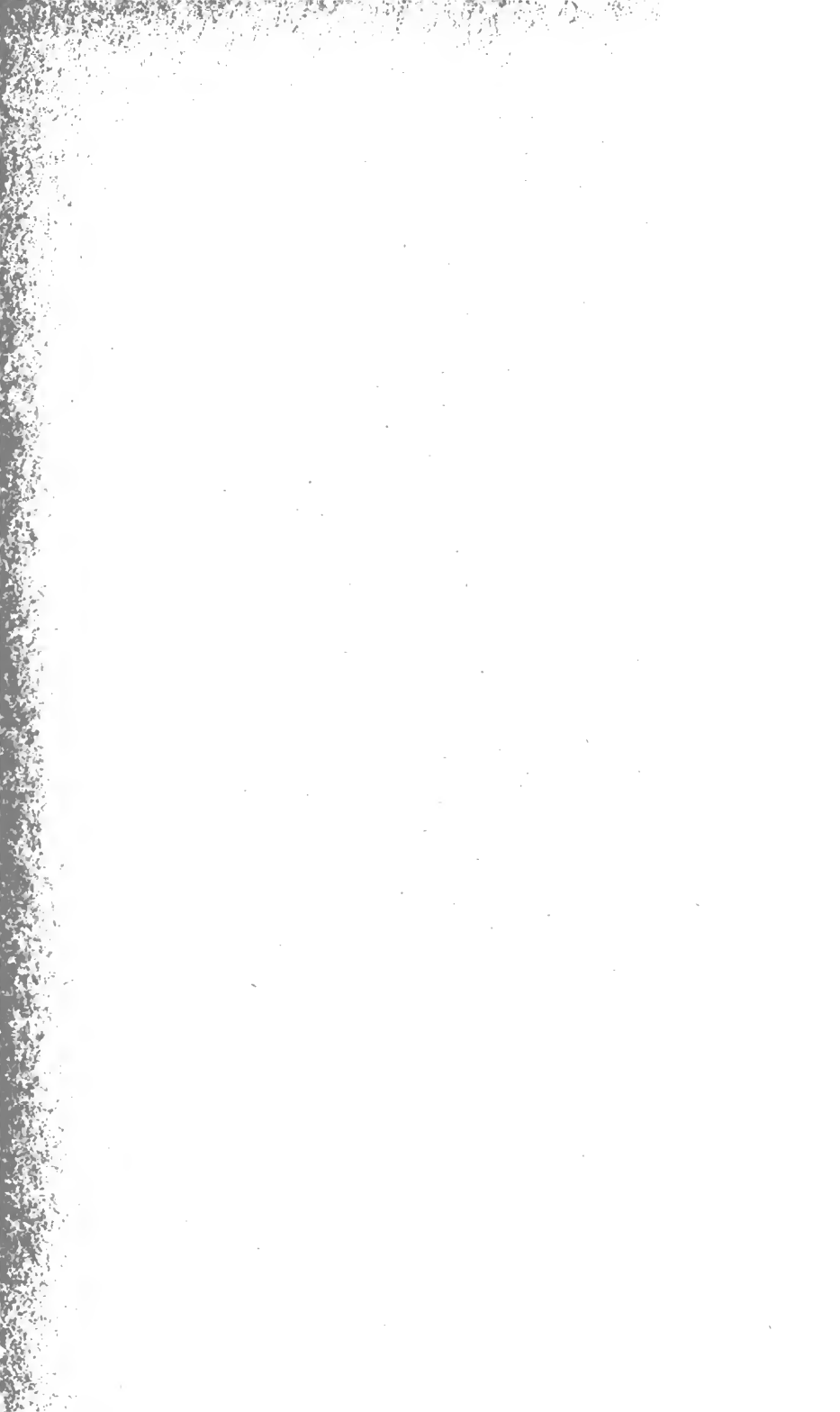
For the reasons herein set forth it is respectfully submitted that the judgment of the District Court should be reversed and the compensation order and award of compensation in favor of appellee Leland T. McClees annulled.

Dated, San Francisco,
March 29, 1943.

THEODORE HALE,
CARROLL B. CRAWFORD,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.



Appendix

(42 U.S.C.A. 1651-1654.)

[PUBLIC LAW 208—77TH CONGRESS]

[CHAPTER 357—1ST SESSION]

[S. 1642]

AN ACT

To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled “Longshoremen’s and Harbor Workers’ Compensation Act”, approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, ir-

respective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and non-nationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941.

No. 10,355

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY
(a Massachusetts corporation),

Appellant,

VS.

JOHN C. GRAY, Deputy Commissioner
of the United States Employees'
Compensation Commission for the
Pacific Compensation District, and
LELAND T. McCLEES,

Appellees.

Upon Appeal from the District Court of the United States for the
Territory of Hawaii.

BRIEF FOR APPELLEES.

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Subject Index

| | Page |
|-----------------------------------|------|
| Statement as to Jurisdiction..... | 1 |
| Summary of Pleadings | 7 |
| Statement of the Case..... | 13 |
| Summary of Argument | 16 |
| Argument | 17 |
| Conclusion | 39 |

Table of Authorities Cited

| Cases | Pages |
|--|--------|
| Aetna Life Insurance Company v. Hoage, Deputy Commissioner, et al., 63 F. (2d) 818..... | 38 |
| Alberta Contracting Corporation v. Santomassimo, 150 Atl. 830 (N. J. 1930)..... | 28 |
| Baltimore and Ohio R. R. Co. v. Clarke, Deputy Commissioner, 59 F. (2d) 595..... | 37 |
| Chrysler v. Blue Arrow Transport Lines, 295 Mich. 606, 295 N. W. 311..... | 24 |
| Cudahy Packing Co. v. Industrial Insurance Commission of Utah, 60 Utah 161, 207 Pac. 148, 28 A. L. R. 1394.... | 19 |
| Fritzmeier v. Texas Employers' Ins. Ass'n, 131 Tex. 165, 114 S. W. (2d) 236..... | 21 |
| George Taylor v. M. A. Gammino Construction Company, et al., 127 Conn. 528, 18 Atl. (2d) 400..... | 23 |
| Johnson v. Thompson Sterrett Co., 174 Ga. 656, 157 S. E. 363 | 28 |
| Katz v. Kadans & Co. et al., 232 N. Y. 420, 134 N. E. 330... | 39 |
| Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527 | 19, 30 |
| Larke v. Hancock Mutual Life Insurance Co., 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584..... | 19 |
| Lee v Fish, et al., 16 N. J. L. 63, 196 Atl. 662..... | 22 |
| Litler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554..... | 19 |
| Lumber Reciprocal Association v. Behnken, 112 Texas 103, 246 S. W. 72, 28 A. L. R. 1402..... | 19 |
| New Amsterdam Casualty Co. v. Hoage, Deputy Commissioner, 62 F. (2d) 468..... | 38 |
| Rubeo v. Arthur McMullen Co., 118 N. J. L. 530, 193 Atl. 797 | 25 |
| Smith v. Industrial Accident Commission, 18 C. (2d) 843, 118 Pac. (2d) 6..... | 20 |

TABLE OF AUTHORITIES CITED

iii

| | Pages |
|--|------------|
| Southern States Mfg. Co. v. Wright, 146 Fla. 29, 200 So. 375 | 21 |
| Swanson v. Latham, 90 Conn. 87, 101 Atl. 492..... | 19 |
| Voehl v. Indemnity Insurance Company, 288 U. S. 162, 169 | 18, 19, 20 |
| William Venho v. Ostrander Railway & Timber Company, et al., 185 Wash. 138, 52 Pac. (2d) 1267..... | 26 |

Codes and Statutes

| | |
|---|------|
| Act of September 13, 1888, C. 1015, Sec. 13 (25 Stat. 479) as amended, U. S. C., Title 8, Sec. 282 (deportation of Chinese) | 6 |
| Defense Bases Act of August 16, 1941 (Public Law 208, 77th Congress; 42 U. S. C. A. 1651-1654)..... | 2, 5 |
| Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927: | |
| 33 U. S. C. A. Sec. 901..... | 16 |
| 33 U. S. C. A. Sec. 918..... | 7 |
| 33 U. S. C. A. Sec. 921..... | 2, 7 |
| Section 20 (a) | 16 |
| Rules of Civil Procedure, Sec. 81 (a) 6..... | 6 |
| 28 U. S. C. A., Title 28, Sec. 225, par. (a)..... | 7 |

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LELAND T. MCCLEES,

Appellees.

Upon Appeal from the District Court of the United States for the
Territory of Hawaii.

BRIEF FOR APPELLEES.

STATEMENT AS TO JURISDICTION.

This is an appeal from an injunction proceeding brought by Liberty Mutual Insurance Company against Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, and Leland T. McClees, a claimant under the provisions of the Longshoremen's and Harbor Workers' Act of

March 4, 1927 (33 U. S. C. A. 921) and Act of August 16, 1941. (42 U. S. C. A., 1651-1654.) The provisions of the Longshoremen's and Harbor Workers' Act are made applicable to certain defense base workers outside the continental limits of the United States. By the Defense Bases Act, viz.:

AN ACT

“To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled ‘Longshoremen's and Harbor Workers' Compensation Act’, approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guan-

tanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and nonnationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife or child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or nonnationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future in-

stallments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend compensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled 'An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes', approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any em-

ployment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941.”

(42 U. S. C. A., 1651-1654.)

(Public Law 208—77th Congress; Chapter 357
1st Session; S. 1642.)

On August 5, 1942, the complaint, “Civil Action No. 477” was filed in the District Court of the United States for the Territory of Hawaii. (R. 12.) Subsequent thereto Deputy Commissioner Andrew R. Schmitz was succeeded by John C. Gray as Deputy Commissioner of the United States Employees’ Compensation Commission for the Pacific Compensation District. On October 31, 1942, it was stipulated by and between the respective parties hereto that John C. Gray may be substituted as a party defendant for Andrew R. Schmitz. (R. 22.) The following allegation is set forth in paragraph I of the complaint (R. 6):

“That this Court has jurisdiction of this cause of action by reason of the Act of Congress of the United States approved August 16, 1941, 55 Stat. 623 (42 U. S. C. A., Secs. 1651-1654) (Defense-Bases Act), and particularly by reason of Section 1653 (b), reading as follows:

‘Judicial proceedings provided under Sections 918 and 921 of Title 33 in respect to a compensation order made pursuant to Sections 1651-1654 of this title shall be instituted in the United States District Court of the Judicial district wherein is

located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs;'

"That in accordance with the aforesaid subsection (b) this complaint is brought pursuant to the procedure set forth in the Longshoremen's and Harbor Workers' Act of March 4, 1927, as amended. (49 Stat. 921, 33 U. S. C. A., Sec. 921.)"

The complaint further alleges that the plaintiff at all times mentioned therein was a Massachusetts corporation, duly licensed to do an insurance business in the Territory of Hawaii (R. 7); sets forth the status and identity of the other plaintiffs; that Andrew R. Schmitz is the Deputy Commissioner for the Pacific Compensation District; that Leland T. McClees is a claimant under the Defense Bases Act (R. 8); and that the plaintiff, Liberty Mutual Insurance Company, at all times mentioned in the complaint was the compensation carrier for the other plaintiffs named therein. (R. 8.)

The Rules of Civil Procedure, Sec. 81 (a) 6, as amended by order of the Supreme Court made on December 28, 1939, to become effective on September 1, 1940, read as follows:

"(6) These rules do not apply to proceedings under the Act of September 13, 1888, C. 1015, Sec. 13 (25 Stat. 479) as amended, U. S. C., Title 8, Sec. 282, relating to deportation of Chinese;

they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, C. 509, Secs. 18, 21 (44 Stat. 1434, 1436), U. S. C. Title 33, Sec. 918, 921, except to the extent that matters of procedure are provided for in that Act."

This Court has jurisdiction of this appeal under and by virtue of 28 U. S. C. A., Section 225, subparagraph (a). Notice of appeal and bond were filed herein on January 2, 1943. (R. 97-98.)

SUMMARY OF PLEADINGS.

Paragraph V of the complaint alleges that in February of 1942, the Contractors (Contractors, Pacific Naval Air Bases, hereinafter referred to as the Contractors) employed the claimant Leland T. McClees, as truck driver at Kaneohe, which employment continued from February 26, 1942 until April 1, 1942 (R. 8); that as a part of the claimant's contract of employment he was, from and after April 10, 1942, furnished board and lodging at the Bird Farm Camp at Kaneohe, said Bird Farm Camp being maintained for that purpose by the Contractors; that claimant last worked for the Contractors on April 14, 1942. (R. 8.)

Paragraphs VI, VII, VIII and IX of the complaint are as follows:

“VI.

That on or about April 15, 1942 claimant, for purposes of his own, asked for and received a one-day leave from his job and traveled as a ‘hitchhiker’ by automobile to Honolulu; that on April 16, 1942 claimant was supposed to report back to work at Kaneohe but that he failed to do so, remaining in Honolulu for purposes of his own; that on April 17, 1942 claimant sustained certain injuries while riding on a Honolulu Construction & Draying Company, Limited laborer truck en route to Kaneohe; that said injury was sustained when said Honolulu Construction & Draying Company, Limited truck collided with another vehicle going in an opposite direction on Nuuanu Avenue in said Honolulu, at a point approximately twelve miles from his place of employment.” (R. 9.)

“VII.

That thereafter, to wit, on or about June 8, 1942, said claimant filed a claim with the defendant Andrew R. Schmitz as said Deputy Commissioner against said Contractors for compensation in connection with alleged physical disability, which disability said Leland T. McClees claimed resulted from an injury arising out of and in the course of his employment with said Contractors; that thereafter, to wit, on June 11, 1942, a hearing was held in the offices of said Andrew R. Schmitz on said claim, which claim was opposed by said Contractors and their insurance carrier, Liberty Mutual Insurance Company; that the proceedings and testimony at said hearing are more particularly set

forth in the transcript of testimony of said hearing which will be produced at the hearing hereof and which is incorporated herein by reference.” (R. 9-10.)

“VIII.

That the evidence at said hearing conclusively proved that at the time of said injuries said Leland T. McClees was not in the employ of the Contractors, was not at his place of employment, was on a personal venture having no connection with his employment, and was not acting in the course of his employment; that at said hearing said Leland T. McClees claimed to have been traveling on said Honolulu Construction & Draying Company, Limited truck in order to return to his place of employment; that the evidence at said hearing showed that claimant was not authorized to return to his place of employment by means of said Honolulu Construction & Draying Company, Limited truck and that said transportation was not a part of his contract of hire, and that said Honolulu Construction & Draying Company, Limited truck was not furnished by the Contractors for the purpose of bringing said Leland T. McClees back to Kaneohe; that after said hearing said defendant Andrew R. Schmitz made and entered an award of compensation to said claimant Leland T. McClees, a copy of which award is hereto attached, marked Exhibit ‘A’ and incorporated in this Complaint by reference.” (R. 10.)

“IX.

That said award of compensation was and is improper, erroneous and invalid and not in accordance with law in the following respects: (9)

1. The defendant Andrew R. Schmitz as Deputy Commissioner aforesaid acted arbitrarily and in excess of his powers and jurisdiction;

2. The findings of fact made by defendant were not based upon substantial, competent evidence as required by law;

3. The claimant was not an employee of the Contractors when he sustained the injury for which compensation is sought;

4. There was no substantial, competent evidence that the injury sustained by the claimant arose out of his employment;

5. There was no substantial, competent evidence that the injury sustained by claimant arose in the course of his employment;

6. The finding in said award that ‘such transportation to work from Honolulu was available for employees other than those who lived at the Contractors’ Hotel if they wished to use it’ and that claimant ‘was using a conveyance provided by the employer for such purposes’ is unsupported by any evidence introduced at said hearing before said Deputy Commissioner;

7. That all of the evidence and the only evidence before the said Deputy Commissioner showed that

the accident occurred off the employer's premises; that the claimant at the time he sustained said injuries was on a personal venture of his own, having no connection with his employment; that he was riding in a conveyance and at a place selected by him, not by the employer, exposing him to hazards not incident to his employment, and that the accident was not the result of any industrial risk, but arose from a common peril to which the public generally was exposed.

Wherefore, plaintiffs pray that defendants be summoned to answer this Complaint if answer they have and that an injunction issue restraining and enjoining said defendants from enforcing said award of compensation and that an order be entered setting aside said award of compensation to said Leland T. McClees and that plaintiffs have their costs herein incurred and such other and further relief in the premises as the Court may deem equitable and just." (R. 11-12.)

The answer of the Deputy Commissioner admits the allegations contained in paragraphs marked and numbered I, II, III, IV and VII of the complaint (R. 2); denies the allegations contained in paragraphs marked and numbered V and IX of the complaint (R. 23); admits that on April 17, 1942, the claimant sustained injuries while riding on a Honolulu Construction & Draying Company, Limited truck en route to Kaneohe, and that said injuries were sustained by virtue of a collision between the truck in which he was riding and another vehicle on Nuuanu Avenue in Honolulu, City and County of Honolulu, Territory of Hawaii,

said accident occurring at a point approximately twelve miles from his place of employment; and denies each and every other allegation in paragraph marked and numbered VI of the complaint (R. 23); admits that upon the completion of the hearing had before Andrew R. Schmitz, Deputy Commissioner of the United States Employees' Compensation Commission for the Pacific Compensation District, that the said Andrew R. Schmitz made and entered an award of compensation to the claimant Leland T. McClees, a copy of which award is attached to said complaint marked Exhibit "A" and incorporated therein by reference, and denies each and every other allegation in paragraph marked and numbered VIII of the complaint. (R. 23.) Further answering the said complaint, the answer alleges that the award of compensation made by the said Andrew R. Schmitz to Leland T. McClees was made and entered fully in accordance with law; that the transcript of the testimony and transactions had before the said Deputy Commissioner and the exhibits produced before him amply, fully and completely justifies the findings of the said Deputy Commissioner and the award of compensation based thereon. The defendant further demands judgment against the plaintiffs dismissing the complaint together with costs and reimbursement of the action. (R. 23-24.)

The answer of the Deputy Commissioner denies and therefore places at issue all controversial allegations of the complaint.

STATEMENT OF THE CASE.

The appellees controvert the statement of the case set forth by the appellant, and in pursuance thereof submit the following statement.

The claimant, Leland T. McClees, was employed by the Contractors on or about January 20, 1942, to work at the Kaneohe Base, at Kaneohe, Island of Oahu. (R. 58-59.) At the time of his employment and up to a short period of time prior to the accident in question, the claimant resided and lived at the Contractors Hotel on North King Street, in the City of Honolulu. (R. 60.) During this period and while the claimant resided and lived at the Contractors Hotel in Honolulu, he was, together with other employees of the Contractors furnished daily transportation by truck from the City of Honolulu to the Kaneohe Base. This daily transportation to the Kaneohe work site was furnished free of charge to the employees. The Contractors for reasons not explained herein, hired and employed an independent local trucking and draying concern, the Honolulu Construction & Draying Company, Limited to furnish this daily transportation of its employees from the Contractors Hotel in Honolulu, to Kaneohe Base, a distance of approximately seventeen or eighteen miles. On or about April 10, 1942, the claimant moved from the Contractors Hotel at Honolulu to the Bird Farm Camp, a camp maintained by his employers and situated approximately one mile from his place of employment at the Kaneohe Base. (R. 60.) Upon moving to his new quarters at the Bird Farm Camp, the claimant continued to be transported

to the Kaneohe Base by truck transportation facilities furnished by his employers. When the claimant lived at the Contractors Hotel in Honolulu, he was transported from the hotel to his daily work in one of two automobile trucks supplied by the Contractors as aforesaid, for the express purpose of transporting their employees who resided in Honolulu, free of charge, from Honolulu to their work sites.

On April 15, 1942, the claimant, at his request, was permitted a "day off" by his foreman. Due to the nature of the claimant's occupation and the essential nature of his work and other related pending projects, employees were permitted a "day off", one day out of seven, for the purpose of attending to necessary personal affairs, entertainment and recreation. (R. 69.) On April 15, 1942, claimant having been granted his "day off" came to the City of Honolulu from the Bird Farm Camp at Kaneohe. From the morning of April 15, 1942, until the inception of his return trip to the Bird Farm Camp from Honolulu, the claimant had no contact with his employers or its agents. After remaining in the City of Honolulu on April 15 and April 16, 1942, the claimant, in pursuance of the practice employed by his employers of transporting their employees from Honolulu to the Kaneohe Base, presented himself on the morning of April 17, 1942, attired in his working clothes at the designated place where the truck transportation supplied by his employers picked up the workmen for transportation from the City of Honolulu to the Kaneohe Base. The claimant, after exchanging salutations with the driver

of the truck, took a seat in the truck along with other workmen designated for the Kaneohe Base. After traveling some distance upon the main thoroughfare from the City of Honolulu to the Kaneohe Base, the truck in which the claimant was a passenger, was side-swiped by a dairy truck traveling in the opposite direction. As a direct result of the collision, the claimant suffered a serious injury to his left arm.

Other testimony of the claimant Leland T. McClees, had at the hearing before the Commissioner. (R. 57-78) discloses the following pertinent facts relative to the appellees' contentions in this appeal. That the claimant was required by his employers to reside and live at the Bird Farm Camp at Kaneohe. (R. 59.) With reference to the transportation supplied from the Contractors Hotel in the City of Honolulu to Kaneohe, that the trucks used in the transportation came to the hotel and that there were two designated trucks used for the transportation from Honolulu to the Kaneohe Base which fact the defendant well knew, having ridden upon the same truck "all the time" on the trip to Kaneohe Base prior to his living at the Bird Farm Camp. The truck had the same driver. (R. 60.) That on the morning of the accident, April 17, 1942, the defendant "picked up" the truck from a friend's house where he had stayed over night (R. 61) and that he knew that there should be a Honolulu Construction & Draying Company, Limited truck carrying Contractors' employees passing by the stop where he got on the truck. (R. 65.) Further, on the morning in question,

the claimant was attired in his work clothes, thus enabling him to proceed directly from the City of Honolulu to the work site at the Kaneohe Base without the necessity of having to stop at the Bird Farm Camp that morning for the purpose of changing his clothes. (R. 74-75.)

SUMMARY OF ARGUMENT.

The following principles of the Longshoremen's and Harbor Workers' Compensation Act are applicable to the appellees' case and may be summarized under the following headings:

I. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. sec. 901 et seq.), should be liberally construed in favor of the injured employee.

II. In the absence of substantial evidence to the contrary, the presumption is "that the claim comes within the provisions of this act"; section 20 (a) of the Longshoremen's and Harbor Workers' Compensation Act.

III. The burden is upon the appellant to show that there was no evidence before the Deputy Commissioner to support the compensation order complained of in the Bill.

IV. The findings of fact of the Deputy Commissioner supported by evidence as in the instant case should be regarded as final and conclusive and not subject to judicial review.

V. That the injury sustained by the claimant was an injury arising out of and in the course of employment.

The subject matter of the foregoing categories are treated in the following argument in conjunction with the appellees' contention regarding the principle issue involved in this appeal, to wit: Whether or not the claimant's injury arose out of and in the course of his employment.

ARGUMENT.

The principal question involved in this appeal, is "Whether the evidence supports the finding of fact of the Deputy Commissioner that the claimant's injury arose out of and in the course of his employment."

Appellant contends, among other things, that since the claimant was injured while on his way to the locus of his employment, that the injury did not therefore arise out of and in the course of his employment.

When compensation acts were first enacted, the courts construed the phrase "arising out of and in the course of employment" strictly and literally, and no injury was considered compensable unless it in fact arose during actual working hours and while the employee was actually engaged in his work at his place of employment. The courts, however, realized that such a strict interpretation of the compensation

laws did not tend to achieve the purposes or intent of the compensation acts. The courts, as a result of this, eventually came to the conclusion as evidenced by a review of the early compensation decisions, that an employee may still be "employed" despite the fact that his physical or manual work had ceased for the time being or had not in fact commenced, and that the mere fact that an injury befell an employee at a time when he was not actually performing labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Company*, 288 U. S., 162, 169, the Supreme Court said:

"* * * The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 424. See, also, *Bountiful Brick Co. v. Giles*, 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall com-

nence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act."

In the *Voehl* case, *supra*, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question whether the employee's injury arose out of and in the course of his employment should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of his work, arose out of and in the course of employment. *Swanson v. Latham*, 90 Conn. 87, 101 Atl. 492; *Larke v. Hancock Mutual Life Insurance Co.*, 90 Conn. 303, 97 Atl. 320, L. R. A. 1916E 584; *Cudahy Packing Co. v. Industrial Insurance Commission of Utah*, 60 Utah 161, 207 Pac. 148, 28 A. L. R. 1394; *Lumber Reciprocal Association v. Behnken*, 112 Texas 103, 246 S. W. 72, 28 A. L. R. 1402; *Lamm v. Silver Falls Timber Co.*, 133 Ore. 468, 286 Pac. 527; *Litler v. Fuller Co.*, 223 N. Y. 369, 119 N. E. 554.

The question of compensable injuries sustained outside of the actual working hours of an employee arises most frequently where the employee is being

transported to or from the situs of his work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated in the *Voehl* case, supra, "no exact formula can be laid down which will automatically solve every case." But a review of recent cases involving that question, will indicate the circumstances and factors which the courts considered of paramount importance in determining the question.

In *Smith v. Industrial Accident Commission*, 18 C. (2d) 843, 118 Pac. (2d) 6, the employee was working on Treasure Island which was the site of the World's Fair in San Francisco. At the end of the day's work he boarded a truck owned by the employer and rode along the roads of the exposition grounds towards the terminal where he was to board a boat; on the way he was injured. The court held that the custom of the employees of riding this truck coupled with the fact that the roads traveled were part of the employer's premises, were important facts to be considered in connection with the question whether the employee left the employment when he boarded the truck. The court held that when transportation is furnished by the employer to convey a workman to and from his place of work as an incident of the employment, and the means of transportation are under the control of the employer, an injury sustained during transportation arises out of and in the course of employment.

In the case of *Southern States Mfg. Co. v. Wright*, 146 Fla. 29, 200 So. 375, the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

“Generally it appears that the employer’s liability in such cases depends upon whether or not there is a contract between employer and employee, express or implied, covering the matter of transportation to and from work. * * *

“So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there*, arranged for the transportation of the employee on the employer’s truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was *an incident to the employment and was exercised in the furtherance of the employment.*” (Italics ours.)

In the case of *Fritzmeier v. Texas Employers’ Ins. Ass’n.*, 131 Tex. 165, 114 S. W. (2d) 236, the employee was hired as a tank builder on a job several miles distant from Gladewater. He did not live where the work was being performed. The employee resided at Gladewater, and rode each morning and back each

evening with a truck driver in charge of the truck being used on the job. The employee and others were instructed to meet at a designated place at Glade-water in order to ride the truck and reach work on time. Fritzmeier was injured while enroute to the place of work.

The court affirmed an award of compensation under the foregoing facts, stating that the transportation was connected with the employment and that, even though the employer had not assumed the obligation of transporting the employee and his collaborators, yet it knew of the arrangement followed and plainly recognized the necessity of the method of transportation.

In the case of *Lee v. Fish et al.*, 16 N. J. M. 63, 196 Atl. 662, decedent was in the employ of the respondent as a helper in his business as a wholesaler grocer. On the day in question, as was his custom, he boarded the truck of his employer preparatory to being taken home after the course of the day's business. The truck was operated by the respondent's brother, who was the manager of the respondent's business. Decedent lived on the route between the employer's place of business and the garage where the truck was garaged. It was the custom of the employer, through his brother, to go for the decedent regularly on Sundays and take him to the respondent's place of business in order to aid the respondent in opening his business on time; this with the knowledge and acquiescence of the employer over a long period of time. Affirming an

award of compensation made for fatal injuries sustained by deceased enroute home, the court said:

“I am satisfied that *the furnishing of the said transportation by the employer was grounded in the mutual convenience and advantage of both the employer and employee. They engaged in this practice until the same ripened into custom.* It is clear that *the furnishing of the said transportation was for the benefit of both parties.* I feel that the same comes clearly within the rule established and so well expressed in the cases of *Rubeo v. McMullen Co.*, 117 N.J.L. 574, 189 A. 662; 118 N.J.L. 530, 193 A. 797; *Salomone v. Ansetta*, N.J. Sup., 194 A. 798, and *Alberta Contracting Corporation v. Santomassimo*, 107 N.J.L. 7, 150 A. 830.

“*‘The relation of employer and employee continues while the employee is riding to and from his employer’s premises, in a truck used in connection with his employer’s work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment.’*

Alberta Contracting Corporation v. Santomassimo, supra.” (Italics ours.)

In the case of *George Taylor v. M. A. Gammino Construction Company, et al.*, 127 Conn. 528, 18 Atl. (2d) 400, the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck to ride home in.

The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The Court in affirming the award of compensation, said:

“An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work*; to do this it is not necessary that the employer should authorize the use of a particular means or method,—although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment*, particularly where it is of benefit to him in furthering that employment.” (Italics ours.)

In the case of *Chrysler v. Blue Arrow Transport Lines*, 295 Mich. 606, 295 N. W. 331, the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured enroute. The question was whether his injury was sustained in

the course of his employment. The Court, affirming an award to the employee, stated:

“Solution of the problem in the present case is aided by the test suggested in the Konopka case, ‘whether under the contract of employment, *construed in the light of all the attendant circumstances*, there is either an express or implied undertaking by the employer to provide the transportation’. In the case before us there was a clear undertaking on the part of the employer to furnish week-end transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town.” (*Italics ours.*)

In the case of *Rubeo v. Arthur McMullen Co.*, 118 N. J. L. 530, 193 Atl. 797, the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the Court said:

“When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delimitation is not so finely drawn. The provision of transportation, if not the subject of an ex-

press or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties*, at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would thereby be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction, of the employer, *into a practice grounded in mutual convenience and advantage*. The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for which he was employed, was yet engaged in that which, by mutual consent, was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment'. The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for." (Italics ours.)

In *William Venho v. Ostrander Railway & Timber Company, et al.*, 185 Wash. 138, 52 Pac. (2d) 1267, plaintiff brought an action to recover damages for personal injuries sustained while riding a logging train from defendant's lumber camp to town. For about two weeks prior thereto, he had been employed in the woods as a "faller", but had ceased to work as such the evening before the accident, and, at the time he was injured, was on his way out from the camp

to Ostrander. He alleged in his complaint that it was the custom of logging companies to transport employees on their logging trains to and from their camps. In order to support its contention that the sole remedy of the employee was under the compensation law, the defendant, Ostrander Railway & Timber Company, pleaded affirmatively that plaintiff was injured "in the course of his employment", and that he was entitled to relief under the workmen's compensation law. The question in the case was: Was plaintiff, at the time of his injuries, "in the course of his employment"? In deciding that he was, the Court said:

"It is the general rule (to which this court adheres) that a workman injured going to or coming from the place of work is not 'in the course of his employment'. There is an exception, however, as well established as the rule itself. The exception, which is supported by overwhelming majority, is this: When a workman is so injured, while being transported in a vehicle furnished by his employer *as an incident of the employment*, he is within 'the course of his employment', as contemplated by the act. In other words, when the vehicle is supplied by the employer for *the mutual benefit of himself and the workman* to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor.

"This exception to the rule may arise either as the result of *custom or contract, express or implied*. It may be implied from the *nature and*

circumstances of the employment and the custom of the employer to furnish transportation.” (Italics ours.)

In the case of *Johnson v. Thompson Sterrett Co.*, 174 Ga. 656, 157 S. E. 363, which involved an injury to an employee who was being transported home from work, the Court said:

“Where it is the custom of an employer to transport employees to and from work, and the employees, with the knowledge and consent of the employer, use a truck furnished or designated by the employer for this purpose, the inference is authorized that the transportation of the employees, whether expressly a part of the contract or not, is one of the incidents of the employment, and where one of the employees, while being so transported, is injured by falling or jumping from the moving truck, the inference is authorized that the injury arises out of and in the course of employment. Daniel Donovan’s case, 217 Mass. 76, 104 N.E. 431, Ann. Cas. 1915C, 778.”

In the case of *Alberta Contracting Corporation v. Santomassimo*, 150 Atl. 830 (N. J. 1930), the employee was injured while riding home on a truck from the stone quarry where he worked which was thirteen miles from the town where he lived. There was no express agreement that the employee should adopt that method of transportation but for several months the employees had used that method with the knowledge and acquiescence of the employer. On an appeal

from an award of compensation made in the case, the Court said:

“The court below found, and we think rightly, that decedent’s death arose out of and in the course of his employment. It was argued below, and is argued here, that such finding was erroneous because the decedent ‘was not engaged in his employment’ while on his way to work.

“The case at bar is one of an obligation to be implied from the conduct of the employer, and is much like the case of *Saba v. Pioneer Contracting Co.*, 103 Conn. 559, 131 Atl. 394.

“We believe that the pertinent rule to be extracted from the cases is this: The relation of employer and employee continues while the employee is riding to and from his employer’s premises, in a truck used in connection with his employer’s work, by direction of his employer, with his knowledge and acquiescence in the continued practice, which was beneficial to both the employer and employee; and an injury sustained while so riding arises out of and in the course of his employment. See *Cicalese v. Lehigh Valley Railroad Co.*, 75 N.J. Law, 897, 69 A. 166; *Depue v. Salmon Co.*, 92 N.J. Law, 550, 106 A. 379; *Dunbaden v. Castles Ice Cream Co.*, 103 N.J. Law, 427, 135 A. 886; *Bolos v. Trenton Fire Clay — Porcelain Co.*, 102 N.J. Law 479, 133 A. 764, affirmed 103 N.J. Law, 483, 135 A. 915.

* * * Whether the truck upon which decedent rode when injured was owned by the employer is immaterial, * * *. The employer did not specifically contract with the decedent to transport him, but assumed the obligation to do so by direct-

ing the decedent and other employees to ride on the trucks, and by knowledge of and acquiescence in the continued practice of the workmen so to ride for a period of sixteen months and until the accident in question."

The case of *Lamm v. Silver Falls Timber Co.*, 133 Ore. 468, 286 Pac. 527, involves facts similar to those in the instant case. The court in that case analyzed and classified the various leading cases having to do with injuries sustained by employees while they were not actually working. The review is quite comprehensive. In view of the similarity of facts and the clarity of the opinion we quote extensively therefrom:

"The plaintiff, after having been in the employ of the defendant for many months, engaged in logging operations, concluded to return to his home in Silverton on Saturday, November 6, 1926, for a short visit; apparently he had no specific objective in mind which he had determined to accomplish during his absence from the defendant's camp. It is clear that neither he nor the defendant had any thought of terminating the plaintiff's employment, and that he expected to shortly return and resume his labors. Thus he retained his bunk house; his blankets, personal belongings, etc., remained in it at the defendant's camp, and in fact when he concluded his labors on Friday, the circumstances were no different than when he quit his work on any other day with the exception that he did not expect to resume his task the following Monday. On Tuesday, November 9th, the plaintiff decided to return so that he could again resume his work on Wednesday.

morning, November 10th; such being his plan, he presented himself at the Silverton terminus of defendant's logging railroad and spoke to an employee in charge of the logging train which was about to start for the camp. He was accepted aboard the train, and in harmony with the uniform practice was charged no fare. This, together with the statement of facts contained in the previous decision which is reported in 277 P. 91, will suffice for the purpose of setting forth the relationship between the parties. It may be useful, however, to remind ourselves of a few facts concerning logging camps which are well known. Work in these camps is distinguishable from that in the factory in the important fact that the logger's employment is discharged at a place which is far removed from his home, places of recreation, and facilities for supplying his wants. * * * While the logger is staying at the camp with its bunk houses, limited boarding accommodations, and meager facilities for supplying the wants of life, he finds frequent occasion to quit work for short periods of time and visit the city. These temporary cessations from labor are due to the nature of the logging camp and the kind of work in which the men are engaged; * * *."

"From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ. His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously. Hence the employment continued not

only while he was working for the defendant in the woods, but also upon his trip to Silverton and back.

“We come now to the more specific question, whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of employment, is not to be determined by the precepts of the common law governing the relationship between master and servant; these ancient rules include the principles defining negligence, assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen’s Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these acts seek to serve leave no room for narrow technical constructions. * * *”

“One of the purposes of the Workmen’s Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. *Stark v. State Industrial Accident Commission*, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in *Wirta v. North Butte Mining*

Co., 64 Mont. 279, 210 P. 332, 355, 30 A. L. R. 964: "The word "employment", as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do. * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee."

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours. * * *"

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter. * * *"

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Acts is to grant compensation to an

injured workman on account of his status. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation. The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of and in the course of his employment', but bore in mind this general purpose of the act, as revealed by its entire text. * * *

"The next group of cases which we shall review may be preceded by the following quotation from *Wells v. Clark & Wilson Lumber Co.*, supra: 'Numerous authorities are cited by appellant to the effect that an employee going to or returning from his work or going to the place where he is employed to perform labor is "acting in the course of his employment", and is subject to the provisions of the Workmen's Compensation Act. This is sound law.'

"In the cases of the type adverted to by the above quotation, the employee was held entitled to the benefit of the act whenever his relationship to the industry subjected him to its hazards in a greater degree than an ordinary member of the public. It will be observed, as we proceed, that the mere fact that the morning whistle had not blown was immaterial; likewise, no controlling significance was attached to the fact that the ac-

cident occurred upon a public street, and that the tort-feasor was a third party. The rule expressed in *Wells v. Clark & Wilson Lumber Co.* is general. The cases which it suggests may be more specifically classified as follows: (1) An employee upon whom an injury is inflicted, while being conveyed to or from his work in a conveyance furnished by his employer as an incident of the contract of employment, is generally held entitled to compensation. * * * (and numerous authorities cited therein.)

“Applying the analogy of the foregoing cases, and the principles which we have endeavored to deduce from them, the conclusion comes irresistibly that, although the plaintiff’s work would not resume until Wednesday morning, the employment began several months previously and continued during the trip from Silverton. Transportation to and from plaintiff’s work upon these occasional trips *was incidental to his employment, hence, the employment continued during the transportation in the same way as during the work.* The injury, occurring during transportation, took place within the period of his employment, and at a place where he had a right to be, and while he was doing something incidental to his employment, because rendered necessary by the peculiar circumstances attendant upon logging operations.” (Italics ours.)

In the instant case a review of the evidence reveals a state of facts which brings the question raised by this appeal conclusively within the principles enumerated in the foregoing authorities. The claim-

ant's journey to and from the City of Honolulu to and from the Bird Farm Camp was incidental to his employment. The trip which the claimant made to Honolulu was clearly within the contemplation of the employer and the employee in view of the fact that the situs of the employee's work was at a point some seventeen to eighteen miles distant from the City of Honolulu, which distance made it necessary for the employee to take occasional trips to town in order to attend to his personal affairs and business, and to seek recreation or other pleasure. The transportation furnished by the employer in the instant case for the transportation of its employees between the City of Honolulu and the situs of the job, was furnished before and continued even after establishment of the labor camp. It appears from the evidence that no rule, notice or regulation, whatsoever, specifically limiting the use of the transportation furnished by the employers was in effect or brought to the notice of the employees.

At the time of the accident the claimant was, as a matter of law, in the employ of the Contractors, Pacific Naval Air Bases. He apparently continued on the payroll of the company during his trip to town and his return therefrom, and both he and his employer understood that, after the temporary cessation of work during the period of his trip to the City of Honolulu that he would again resume his duties. It was therefore his status as an employee of the Contractors which accorded him every right and opportunity, when, on the morning of the accident, and at-

tired in his working clothes he boarded the truck furnished by his employer on his way to the locus of his work. The furnishing of the transportation by the employer was for the mutual benefit of the employer and employee.

Upon the question "that the accident arose from the common peril from which the public generally was exposed", referred to as the "Commonalty Doctrine", appellant contends it is necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general is subjected, the following authority conclusively discloses that the doctrine, if in fact it was at any time recognized as such, has been specifically rejected. In the case of *Baltimore and Ohio R. R. Co. v. Clarke, Deputy Commissioner*, 59 F. (2d) 595, the court said:

"And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of and in the course of employment,' 33 U. S. C. A. Sec. 902. It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute. A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may

not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter.”

The doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, Deputy Commissioner*, 62 F. (2d) 468, which arose under the Longshoremen’s Act as applied in the District of Columbia. The Court in that case said:

“In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not ‘arise out of’ the workmen’s employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned.*” (Italics ours.)

In the case of *Aetna Life Insurance Company v. Hoage, Deputy Commissioner, et al.*, 63 F. (2d) 818, the appellant attempted to invoke the old “Commonalty Doctrine” in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general, the same argument which plaintiffs may advance in the present case. In the *Aetna Life Insurance Company* case the court definitely re-affirmed the position previously taken in the *New Amsterdam Casualty Company* case, supra, by holding that:

“* * * Although the risk may be common to all who are exposed to the sun’s rays on a hot day, the question is whether the employment exposes the employee to the risk. * * *”

The case of *Katz v. Kadans & Co. et al.*, 232 N. Y. 420, 134 N. E. 330, further nullifies the application of the “Commonalty Doctrine” wherein the court specifically states:

“* * * But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. The question is whether the employment exposed the workman to the risks by sending him onto the street, common though such risks were to all on the street.”

CONCLUSION.

The appellees respectfully submit that in view of the authorities and argument pertaining thereto hereinabove set forth, that the injury sustained by the claimant Leland T. McClees, arose out of and in the course of his employment with the Contractors, and it is further respectfully submitted that the judgment of the District Court should be affirmed.

Dated, Honolulu, T. H.,
May 14, 1943.

ANGUS M. TAYLOR, JR.,
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EDWARD TOWSE,

Special Assistant to the United States Attorney, District of Hawaii,

Attorneys for Appellees.



No. 10,355

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY
(a Massachusetts corporation),
Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner
of the United States Employees'
Compensation Commission for the
Pacific Compensation District, and
LELAND T. McCLEES,
Appellees.

Upon Appeal from the District Court of the United States for the
Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

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Subject Index

| | Page |
|--|------|
| General Comment on Appellees' Brief | 1 |
| Analysis of Appellees' Authorities | 3 |
| Alberta Contracting Corp. v. Santomassimo (N. J.), 150 Atl. 830 | 11 |
| Biliter v. Hickman (Ky.), 56 S. W. 1003 | 13 |
| Boggess v. Ind. Acc. Com., 176 Cal. 534, L. R. A. 1918F 883, 169 Pac. 75 | 9 |
| Chrysler v. Blue Arrow Transport Lines, 295 Mich. 606, 295 N. W. 331 | 11 |
| Cudahy Packing Co. v. Ind. Ins. Com. of Utah, 60 Utah 161, 207 Pac. 148 | 5 |
| Fritzmeier v. Texas Employers' Ins. Assn., 131 Texas 165, 114 S. W. (2d) 236..... | 10 |
| George Taylor v. M. A. Gammino Const. Co., 127 Conn. 528, 18 Atl. (2d) 400 | 10 |
| Gruber v. Mercy, 7 N. J. Misc. 241, 145 Atl. 106..... | 9 |
| In re Donovan, 217 Mass. 76, Ann. Cas. 1915C 778, 104 N. E. 431 | 9 |
| In re Lee v. Fish et al., 16 N. J. M. 63, 196 Atl. 662... | 10 |
| Johnson v. Thompson Sterrett Co., 174 Ga. 656, 157 S. E. 363 | 11 |
| Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527 | 6 |
| Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320 | 5 |
| Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554..... | 7 |
| Lumber Reciprocal Assn. v. Behnken, 112 Texas 103, 246 S. W. 72 | 6 |
| Rubeo v. Arthur McMullen Co., 118 N. J. L. 530, 193 Atl. 797 | 10 |
| Smith v. Ind. Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6 | 7 |
| Southern States Mfg. Co. v. Wright, 146 Fla. 29, 200 So. 375 | 9 |
| Swanson v. Latham, 90 Conn. 87, 101 Atl. 492..... | 4 |
| Trussless Roof Co. v. Ind. Acc. Com., 119 Cal. App. 91, 93, 6 Pac. (2d) 254 | 8 |
| Voehl v. Indemnity Ins. Co., 288 U. S. 167, 77 L. Ed. 676 | 4 |
| William Venho v. Ostrander, etc., 185 Wash. 138, 52 Pac. (2d) 1267 | 11 |
| Conclusion | 12 |

Table of Authorities Cited

| | Pages |
|--|---------|
| Alberta Contracting Corp. v. Santomassimo (N. J.), 150 Atl. 830 | 11 |
| Biliter v. Hickman (Ky.), 56 S. W. 1003 | 13 |
| Boggess v. Ind. Acc. Com., 176 Cal. 534, L. R. A. 1918F 883, 169 Pac. 75..... | 9 |
| Chrysler v. Blue Arrow Transport Lines, 295 Mich. 606, 295 N. W. 331 | 11 |
| Cudahy Packing Co. v. Ind. Ins. Com. of Utah, 60 Utah 161, 207 Pac. 148 | 5 |
| Fritzmeier v. Texas Employers' Ins. Assn., 131 Texas 165, 114 S. W. (2d) 236 | 10 |
| George Taylor v. M. A. Gammino Const. Co., 127 Conn. 528, 18 Atl. (2d) 400 | 10 |
| Gruber v. Mercy, 7 N. J. Misc. 241, 145 Atl. 106..... | 9 |
| In re Donovan, 217 Mass. 76, Ann. Cas. 1915C 778, 104 N. E. 431 | 9 |
| In re Lee v. Fish et al., 16 N. J. M. 63, 196 Atl. 662..... | 10 |
| Johnson v. Thompson Sterrett Co., 174 Ga. 656, 157 S. E. 363 | 11 |
| Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527 | 6 |
| Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320 | 5 |
| Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554..... | 7 |
| Lumber Reciprocal Assn. v. Behnken, 112 Texas 103, 246 S. W. 72 | 6 |
| Rubeo v. Arthur McMullen Co., 118 N. J. L. 530, 193 Atl. 797 | 10 |
| Smith v. Ind. Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6 | 7, 8, 9 |
| Southern States Mfg. Co. v. Wright, 146 Fla. 29, 200 So. 375 | 9 |
| Swanson v. Latham, 90 Conn. 87, 101 Atl. 492..... | 4 |
| Trussless Roof Co. v. Ind. Acc. Com., 119 Cal. App. 91, 93, 6 Pac. (2d) 254 | 8 |
| Voehl v. Indemnity Ins. Co., 288 U. S. 162, 77 L. Ed. 676 | 4 |
| William Venho v. Ostrander, etc., 185 Wash. 138, 52 Pac. (2d) 1267 | 11 |

No. 10,355

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LIBERTY MUTUAL INSURANCE COMPANY
(a Massachusetts corporation),
Appellant,

vs.

JOHN C. GRAY, Deputy Commissioner
of the United States Employees'
Compensation Commission for the
Pacific Compensation District, and
LELAND T. MCCLEES,
Appellees.

Upon Appeal from the District Court of the United States for the
Territory of Hawaii.

APPELLANT'S REPLY BRIEF.

GENERAL COMMENT ON APPELLEES' BRIEF.

Taking up the sections of Appellees' Brief in their serial order it may be said, first of all, that appellees' Statement as to Jurisdiction (pages 1-7) requires no comment. The same is true of their Summary of Pleadings. (Pages 7-12.)

Without naming any specific inaccuracies or omissions therein, appellees "controvert the statement of the case set forth by appellant", and submit one of

their own. On page 14 of their brief appear these words:

“* * * the claimant, in pursuance of the practice employed by his employers of transporting their employees from Honolulu to the Kaneohe Base, presented himself on the morning of April 17, 1942, attired in his working clothes at the designated place where the truck transportation supplied by his employers picked up the workmen for transportation from Honolulu to the Kaneohe Base. The claimant, after exchanging salutations with the driver of the truck, took a seat in the truck along with other workmen designated for the Kaneohe Base.”

These words imply that the morning truck running between Honolulu and Kaneohe was for the benefit of any Contractor employees who might choose to use it, whereas its sole purpose was to take *Honolulu* residents to their work at the Naval Base. Claimant McClees did in fact testify that he climbed on the truck along with other workers and took a seat among them, but even he did not claim this service as a right, much less as a condition of his contract of employment. The claimant was asked by Deputy Commissioner Schmitz (R. p. 72):

“Q. Is there a rule by the Contractors that would require the men to obtain their own transportation by taxicab or bus from Honolulu to the job when they actually live out at Kaneohe and are visiting in Honolulu?”

A. You have got to furnish your own transportation then; it is up to you, yes.”

The claimant had previously admitted that he came into town on a personal mission. (R. p. 72.)

Until some error is definitely pointed out appellant will stand by its Statement of the Case as printed in its opening brief, pages 9-12, for it follows the transcript of the record.

ANALYSIS OF APPELLEES' AUTHORITIES.

Appellant's counsel have examined each one of the cases submitted by appellees as supporting the award, and have read the entire opinion in those in which the Going and Coming Rule is involved. One of appellees' authorities is a frozen nose case. Two represent the railroad track-hazard class mentioned on page 16 of Appellant's Opening Brief, where a claimant's injuries were incurred through being struck by a passing train or switch engine. Nothing in these cases relates to the Going and Coming Rule as here considered.

It will be observed that in the traveling employee cases cited by appellees, in each instance recovery by a claimant is predicated upon the knowledge and consent of the employer as to the means used in going or coming. In some cases, the employer arranged for transportation as part of the wage, in others he consented to the use of trucks, logging trains or the like by the employees until long usage had established a custom. But in no case cited by appellees does it appear that an employee absent on leave (or

overdue on leave) recovered compensation where he was returning to his job in a truck not owned by the employer, not driven by one of the claimant's fellow employees and not designated by the employer as the conveyance which claimant must use.

Following is an analysis of each authority cited by appellees' brief, to which the page numbers in the black type refer:

Voehl v. Indemnity Ins. Co., 288 U. S. 162, 77 L. Ed. 676.
(Page 18.)

For an analysis of this case see Appellant's Opening Brief, page 15. The opinion contains an excellent statement of the "Going and Coming Rule" and the exceptions thereto, but nothing in the opinion or in the facts of the case tends to uphold the judgment in the instant case. Voehl was injured while actually under the direction of his employer and on active duty for which he was being paid.

Swanson v. Latham, 90 Conn. 87, 101 Atl. 492. (Page 19.)

Not in point herein for the reason that Swanson, the employee, who was killed, was riding with a fellow workman whom the employer had engaged to transport such men as chose to live in Willimantic, Connecticut, to and from Stafford Springs, Connecticut, where Latham & Crane, Willimantic contractors, were erecting a building. Employees who wished to remain in Stafford Springs from day to day, were allowed 90 cents a day in lieu of transportation to and from Willimantic. The award in claimant's favor was affirmed.

Larke v. Hancock Mutual Life Ins. Co., 90 Conn. 303, 97 Atl. 320. (Page 19.)

Appellees do not state why they cite this case. It would appear to be out of place in sunny Honolulu, for Larke's injuries arose from a frozen nose. The fourth head note (97 Atl. 320) states the facts of the case as follows:

“An employee of an insurance company who was required to solicit insurance and collect premiums was required in his business to make long rides, regardless of weather conditions. On a very cold day his nose became frostbitten. The frost bite produced a lesion of the skin and tissues, through which the servant contracted erysipelas, from which he died.”

Cudahy Packing Co. v. Industrial Insurance Commission of Utah, 60 Utah 161, 207 Pac. 148.

This is a case involving special hazards to which an employee must expose himself while approaching or leaving his employer's premises. (See Appellant's Opening Brief, p. 16, third paragraph.) The location of the Cudahy packing plant near railroad tracks made it necessary for employees going to work to cross the tracks on a public road at a point about 100 feet from the entrance to the plant. An employee attempting to cross the tracks was struck by a railroad locomotive and killed. It was held that death arose out of the employment.

As appellant has pointed out on page 16 of its opening brief, these railroad hazard cases are in a class by themselves, but it is a class to which the case at bar does not belong.

Lumber Reciprocal Association v. Behnken, 112 Texas 103, 246 S. W. 72. (Page 19.) The second head note (246 S. W. 72) explains the nature of this case, likewise its inapplicability herein.

“Where a lumber company owned a whole town wherein the residences of its employees were separated from the boarding house, store, and main works by a railroad track over which there was but one well defined dirt road crossing, which was necessarily used by all employees in going to and coming from work, *held*, that an injury to an employee at such crossing while returning to his work after his noonday meal, by a train not under the control of the company, occurred in the course of his employment, and had to do with and arose out of the business of the employer within the Workmen’s Compensation Act.”

Lamm v. Silver Falls Timber Co., 133 Ore. 468, 286 Pac. 527. (Page 19, also pages 30-35.)

This case represents a common type of exception to the Going and Coming Rule. The claimant, a logger, was injured while returning from town to the logging camp on his employer’s logging train. *It was the custom of the camp and one of the privileges accorded employees as a condition of their employment* that they might ride back and forth on the train at pleasure. The isolation of the camp and distance from town rendered this arrangement necessary as there was no public or independent passenger service from town to the Silver Falls Timber Company’s camp as there was from Honolulu to Kaneohe.

Use of logging trains by employees is customary, and in the *Lamm* case long usage had established it

as something not only permitted and acquiesced in by the employer but actually expected by it.

Littler v. Fuller Co., 223 N. Y. 369, 119 N. E. 554.

The claimant in this case was a bricklayer apparently living in New York City. He was employed by the Fuller Company, contractors who were constructing a residence at Great Neck, Long Island, two miles from the railroad station. The employer hired an automobile to take his workmen, who arrived by train, from the station to the job each day and bring them back at night. While making one of these trips Littler was thrown out and injured. The situation is similar to the one which would have arisen had claimant McClees been injured while being transported from Bird Farm Camp to Kaneohe. Under the actual circumstances of the instant case the *Littler* case is not in point.

Smith v. Ind. Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6.
(Page 20.)

This is one of the cases on which appellees most depend. As will presently be shown, they have failed to print portions of the opinion unfavorable to their contention. But even the summary of the case set forth on page 20 of their brief offers no authority for affirming the judgment herein. Appellees say (p. 20, second paragraph) "the employee was working on Treasure Island". Claimant Smith was in fact an employee of the exposition company, was injured *on his employer's premises* when he jumped from his employer's truck upon which he was riding after he had checked out at

the Administration building at the close of the day's work.

Even with this set up, the California Industrial Accident Commission denied compensation to the claimant. The California Supreme Court annulled the Commission's order denying compensation, giving as its reasons for so doing (1) the fact that employees were freely permitted by the exposition company to ride about the grounds on the exposition trucks, and (2) more particularly because the injury happened on the employer's premises. Neither of these circumstances are present in the instant case, which fact makes the *Smith* case unavailable to claimant as a precedent.

That portion of the opinion not printed or summarized by appellees furnishes ample authority for reversing the judgment herein:

"It may be observed with reference to petitioner riding upon the employer's truck, that it is the general rule that when transportation is furnished by the employer to convey a workman to and from his place of work, *as an incident of the employment*, and the means of transportation *are under the control of the employer*, an injury sustained during such transportation arises in the course of employment and is compensable. (Harlan v. Industrial Acc. Com., 194 Cal. 352, 228 Pac. 654; Dellepiani v. Industrial Acc. Com., 211 Cal. 430, 295 Pac. 826.) *But the transportation furnished must be connected with the employment*, or, as said in Trussless Roof Co. v. Industrial Acc. Com., 119 Cal. App. 91, 93, 6 Pac. (2d) 254:

‘The use of the words “as such” is necessary because courtesy rides given by the employer do not give rise to liability under the statutes. (Bog-gess v. Industrial Acc. Com. (1917), 176 Cal. 534, L. R. A. 1918F 883, 169 Pac. 75; Gruber v. Mercy (1929), 7 N. J. Misc. Rep. 241, 145 Atl. 106.) In other words, *the transportation has to be furnished as a part of the contract of employment*, to come within the rule. (In re Donovan (1914), 217 Mass. 76 (Ann. Cas. 1915C 778, 104 N. E. 431.)’ ”

Smith v. Industrial Acc. Com., 18 Cal. (2d) 843, 118 Pac. (2d) 6, *supra*.

It will thus be seen that the *Smith* case, when fairly read and considered as a whole, supports the contentions of appellant herein rather than those of appellees.

Southern States Mfg. Co. v. Wright, 146 Fla. 29, 200 So. 375.
(Page 21.)

In connection with the consideration of this case it should be remembered that claimant McClees at the time of the accident was living at Bird Farm Camp. He was required to live there. (R. p. 59.) Bird Farm Camp was about a mile from the job and the Contractors furnished transportation thereto. (R. p. 60.) Had claimant McClees been injured while riding between Bird Farm Camp and the Kaneohe Base, *Southern States Mfg. Co. v. Wright* would be a perfect precedent. Under the circumstances of the instant case, however, its value to appellees is negative.

Wright was injured while being transported in a truck of his employer to the place of employment. This transportation was by means of employer's truck and was arranged for by employer.

Fritzmeier v. Texas Employers' Ins. Ass'n, 131 Tex. 165, 114 S. W. (2d) 236. (Page 21.)

In the above case the employees of a tank builder at Gladewater, Texas, were instructed to meet at a designated place in Gladewater each morning to ride to a job several miles out of town. The conveyance was a truck used on the job. Fritzmeier was injured while en route to the job. Here also it may be said that the case would be in point if claimant McClees had been injured while being transported from Bird Farm Camp to Kaneohe Base.

As appellees remark (p. 22), the award was affirmed because the employer knew of the arrangement and recognized the necessity of it, neither of which reasons apply to the instant case.

In *Lee v. Fish et al.*, 16 N. J. M. 63, 196 Atl. 662 (page 22 of Appellees' Brief), and *George Taylor v. M. A. Gammino Const. Co.*, 127 Conn. 528, 18 Atl. (2d) 400 (p. 23), the transportation was accomplished with the knowledge and acquiescence of the employer and was authorized by him. The route traveled in each instance was between the employee's home and the job. The same is true of *Rubeo v. Arthur McMullen Co.*, 118 N. J. L. 530, 193 Atl. 797, cited on page 25 of Appellees' Brief.

Chrysler v. Blue Arrow Transport Lines, 295 Mich. 606, 295 N. W. 331.

In this case the claimant drove a truck between Grand Rapids, Michigan, and Chicago. Arriving at Chicago on Saturday too late to load for the return that day, he boarded another company truck and returned to Grand Rapids in order to spend the week end at home. He was injured on Sunday while returning to Chicago on a third truck. Inapplicability of this case to the one at bar is distinctly shown by the last line of the citation on page 25 of Appellees' Brief:

“In the case before us *there was a clear undertaking on the part of the employer to furnish week-end transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town.*”

William Venho v. Ostrander, etc., 185 Wash. 138, 52 Pac. (2d) 1267; *Johnson v. Thompson Sterrett Co.*, 174 Ga. 656, 157 S. E. 363, and *Alberta Contracting Corp. v. Santomassimo*, 150 Atl. 830 (New Jersey) (Appellees' Brief, pp. 26-28), are all cases where the transportation was furnished the employee either by the express direction of the employer or with his knowledge, acquiescence and consent. The character of transportation furnished would be the counterpart of that extended to claimant McClees each morning when his employers transported him from his boarding place at Bird Farm Camp to Kaneohe Base, therefore these cases are not in point herein.

CONCLUSION.

The authorities cited in appellant's opening brief cover the law of the Going and Coming Rule to such an extent that additions might be regarded as merely cumulative. However, a single case involving "courtesy" or "accommodation" rides may aptly be inserted here:

In this case, the employees were left to find their own way of reaching their places of work along a newly constructed highway and it was customary for them to ride to their places of work along the highway in their own autos or in those of friends or in the employer's trucks or hired trucks. A foreman, about one-half hour before the usual time for beginning work, offered a ride to an employee whom he saw walking along the road in order that the employee might begin work as soon as possible. The employee fell from his position on the running board of the foreman's vehicle. It will be noted that in this case there was every reason for saying that the transportation of the deceased employee was for the benefit of the employer as well as the employee. However, the Court denied compensation, saying:

"In the instant case it was optional with Hickman by what method he would go to the place where his work and employment would commence, as to whether he would walk or ride thereto. His employer did not include the privilege of transportation from his home to his work within the terms of his employment, expressly or impliedly. The undisputed facts clearly show that the employer never intended to include transportation

to his work as an incident of his employment or the hazard involved in such mode of transportation for use of the highway as one of the risks of his employment or incidental thereto.”

Biliter v. Hickman (Ky.), 56 S. W. (2d) 1003.

For the reasons herein set forth it is again respectfully submitted that the judgment of the District Court should be reversed and the compensation order and award of compensation in favor of appellee Leland T. McClees annulled.

Dated, San Francisco,
May 24, 1943.

THEODORE HALE,
CARROLL B. CRAWFORD,
Attorneys for Appellant.

No. 10410

United States
Circuit Court of Appeals
For the Ninth Circuit.

GRIFFITHS DAIRY, INC., a corporation,

Appellant,

vs.

CLARK SQUIRE, Collector of Internal Revenue,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Northern Division

FILED
MAY 24 1943
PAUL P. O'BRIEN,
CLERK

No. 10410

United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

| | Page |
|--|------|
| Answer | 10 |
| Appeal: | |
| Certificate of Clerk to Transcript of Record on | 23 |
| Notice of | 21 |
| Statement of Points and Errors on..... | 22 |
| Certificate of Clerk to Transcript of Record on Appeal | 23 |
| Complaint | 2 |
| Conclusions of Law..... | 17 |
| Findings of Fact and Conclusions of Law.... | 12 |
| Judgment | 19 |
| Names and Addresses of Attorneys of Record. | 1 |
| Notice of Appeal..... | 21 |
| Statement of Points and Errors on Appeal, Appellants | 22 |

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[1*]

In District Court of the United States,
Western District of Washington,
Northern Division.

No. 454

GRIFFITHS DAIRY, INC., AUSTIN E. GRIF-
FITHS, JR.,

Plaintiffs,

vs.

GUY T. HELVERING, as Commissioner, CLARK
SQUIRE, as Collector of Internal Revenue,
and THOR W. HENRICKSEN, as Acting Col-
lector of Internal Revenue,

Defendants.

COMPLAINT.

Plaintiffs, for cause of action against defendants,
allege:

Plaintiffs invoke the jurisdiction of this Court
because this is a controversy arising under and by
virtue of Schedule A-2 of Title VIII of the United
States Revenue Act of 1926, as amended by Section
722 (a) of the Revenue Act of 1932; and under and
by virtue of Schedule A-3 of Title VIII of the
United States Revenue Act of 1926, as amended
by Section 723 (a) of the Revenue Act of 1932.

I.

That plaintiff corporation was organized under
the laws of the State of Washington, July 5, 1940,
and is doing business in Seattle in said state. That

plaintiff Austin E. Griffiths, Jr. during all the times in this Complaint stated was and is a citizen of the United States and of said state, residing in King County thereof.

II.

That defendant Guy T. Helvering is the duly appointed, qualified Commissioner of Internal Revenue, and defendant Clark Squire is the duly appointed, qualified Collector of Internal Revenue, and defendant Thor W. Henricksen is the duly appointed, qualified and Acting Collector, Tacoma District, Treasury Department, in the State of Washington, of the United States of America, and were such officers during the time in this Complaint stated. [2]

III.

That plaintiff corporation was organized in the manner following: That Austin E. Griffiths, Jr. and his wife were for many years prior thereto and on the 5th day of July, 1940, the owners, as a Washington State community, of a dairy business in and about said Seattle known as the Griffiths Dairy, and which business comprised eleven (11) milk routes, trucks, cans, furniture, and other dairy equipment of an estimated value of \$60,685.00, and at the same time were in debt on account of said business in the sum of \$34,780.00.

IV.

That said Griffiths, Jr. was advised to form a corporation and to pay for the capital stock by turn-

ing over to the corporation said dairy business, routes, trucks, equipment, and goodwill relating thereto at an estimated value of \$60,685.00, subject to the said debts of \$34,780.00, the said debts to be paid by said corporation in due course of its business.

V.

That said Griffiths, his wife, and one of his said dairy employees, Byron T. Parry, did organize plaintiff corporation on the date aforesaid as follows: Said Griffiths, Jr., said wife, and Parry were the sole incorporators and the sole and first directors and officers thereof.

VI.

That said Griffiths, Jr. subscribed for 39,000 shares, his wife for 9,000 shares, said Parry for 2,000 shares, and being all the shares of said corporation.

VII.

That the capital stock of said corporation was fixed at 50,000 shares, each of no par value, of which 14,000 were preferred and 36,000 were common stock. [3]

VIII.

That Griffiths and his wife paid for all of said stock or shares by sale or transfer to said corporation of said dairy business, its routes, trucks, equipment, and goodwill thereof as a going concern, and said corporation accepted, took over, and entered into possession of the same in full payment of its capital stock and shares.

IX.

That in this transaction the capital stock was fixed at \$50,000.00, no par value, divided as aforesaid, and the property sold or transferred to it was estimated or appraised at \$60,685.00, and the said debts assumed by it amounted to and were fixed in the sum of \$34,780.00, and the shares of stock were assumed or said to be worth \$1.00 each.

X.

That the shares of said Parry subscribed as aforesaid were given or set over to him by reason of his then employment and of bonus money coming to him from said Griffiths and wife and to qualify him as a director of the corporation.

XI.

That prior to and on the 14th day of February, 1941, no persons subscribed for, took, or bought shares of said corporation other than as before stated, except as follows: M. Clothier took 1,000 shares at an estimated price or value of \$1,000.00 to apply on a prior debt in excess of that sum then due said Clothier from said Griffiths Dairy and pursuant to an agreement that in case said corporation was formed said Clothier would subscribe for 1,000 shares and apply \$1,000.00 to reduce said debt against said Griffiths Dairy and against said corporation, and, provided, further, that said corporation would continue to buy dairy supplies from said Clothier substantially to the extent to which said Griffiths Dairy had previously bought dairy

supplies; and one Donald Sell took 600 shares of stock at an estimated or fixed value of \$600.00, or \$1.00 per share, by reason of being employed by plaintiff as a milk driver, and with the further agreement that, in case said Sell ceased to be so employed, then his said shares were to be taken back by the corporation at the same price charged or paid for them. [4]

XII.

That on or between the 14th and 24th days of February, 1941, defendants assessed, imposed, and levied against plaintiffs a revenue documentary stamp tax of \$55.00 on account of the original subscription of said Griffiths, Jr., his wife, and Parry as aforesaid; and also assessed, imposed, and levied the further sum of \$1,100.00 against plaintiffs by reason of the alleged gift or transfer to said treasury of the stock or shares which was given to said corporation by said Griffiths, Jr. and wife; and defendants also assessed, imposed, and levied the further sum of \$80.00 on account of the subsequent issuance or transfer to said Clothier and Sell of said 1,600 shares, amounting to the sum total of \$1,235.00; and defendants have also added thereto a penalty of \$61.75 and interest of \$2.47 and further interest on the whole of said total sum from said last date at the rate of 1% per month until the whole of said tax shall have been paid.

XIII.

That no person has subscribed or taken stock of plaintiff corporation other than as aforesaid,

namely, to reduce a prior debt or upon a special inducement of employment by plaintiff and the payment thereof in all or in part out of wages paid said subscriber by plaintiff.

XIV.

That the corporation was formed to take over the said Griffiths Dairy business in order that the said business might be carried on more advantageously and with the expectation that prior creditors of said business would take stock in full or in part-payment of their claims, and that employees would become interested in plaintiffs' business and become part owners thereof by taking stock therein. And plaintiffs allege both said purposes have failed by reason of the imposition of said stamp taxes. [5]

XV.

That said stock is and always has been without market value and unsaleable for cash in Seattle or elsewhere. That said stock was made of no par value because of its having no market or fixed value by reason of the nature of the corporation and the purpose of its formation in taking over an existing business, subject as aforesaid to the payment of the debts against said business.

XVI.

That during all the times in this Complaint stated all of said stock has had and now has only a nominal value, either for sale or for documentary stamp taxation purposes.

XVII.

Plaintiffs allege said stamp taxes and each of them were and are erroneously, arbitrarily, and illegally imposed, levied, and assessed against plaintiffs, and that said taxes have been and are being wrongfully collected by defendants from plaintiffs.

XVIII.

Plaintiffs allege that said taxes are so excessive and so without legal or other just basis that they were and are exactions and confiscation, and the collection thereof deprives plaintiffs, under the name of taxation, of their property without due process of law, and that said taxes have been and are being collected by defendants without authority of law.

XIX.

That plaintiffs have protested to defendants the legality and justice of said taxes but nevertheless have under compulsion paid part thereof and are under agreement of date March 24, 1941, CST=19581-RT: VLH, subject to their protest, to pay at rate of \$120.00 per month the remainder thereof. That they petitioned defendants, and in particular defendant Commissioner, for abatement of said tax, penalty and *intent* and for refund of the amount thereof, \$120.00 then paid, but said petition was on June 17, 1941 by defendants denied. MT=S.T=RFM-C1.M-94789. [6]

XX.

That defendants and each of them acted in the premises as aforesaid wholly as said officers of the

Government of the United States and in the interest and for the use and benefit of said Government and in discharge, however erroneously, of their several and respective duties as such officers.

Wherefore, plaintiffs pray that said tax be adjudged illegal and void, and for judgment against defendants and each of them for the amount of tax or refund thereof now paid or which may be paid pending the trial of this cause; or that the real or market or lawful value of said stock shall be ascertained and fixed on the trial of this cause, and for judgment deciding when and by whom, if at all, said treasury stock, gift, or transfer shall be taxed and paid.

Plaintiffs pray for such other, further, and different judgment and relief as may be lawful, just, and equitable, and for their costs and disbursements.

AUSTIN E. GRIFFITHS

Attorney for Plaintiffs.

Office & Postoffice Address:

608-9 Fourth & Cherry

Bldg.,

Seattle, Washington.

(Duly verified.)

[Endorsed]: Filed Dec. 23, 1941 [7]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Civil Action

No. 454

GRIFFITHS DAIRY, INC.,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

ANSWER

Comes now J. Charles Dennis, United States Attorney, and for answer to the complaint filed in the above entitled action as amended by the Order on Motion herein on September 8, 1942, dismissing the action as to the plaintiff, Austin E. Griffiths, Jr., and as to Guy T. Helvering and Thor W. Hendricksen, defendants, and admits, denies, and alleges as follows:

1. Denies the allegations of Paragraphs I to XI, inclusive, XIII to XVIII, inclusive, and XX of the complaint.

2. Denies the allegations of Paragraph XII of the complaint. Admits, however, that on January 29, 1941, a stamp tax was assessed on the December, 1940, Miscellaneous Tax List of the Commissioner of Internal Revenue in the amount of \$1,235; that payments were made thereon as follows: March 26, 1941, \$120; May 8, 1941, \$120; June 10, 1941, \$120; and October 8, 1941, \$240.

3. Denies the allegations of Paragraph XIX of the complaint. Admits, however, that on April 5, 1941, Griffiths Dairy, Inc., filed a Form 843, requesting the abatement of the above mentioned assessment of \$1,235, "plus penalty and interest of \$170.15", to which is attached a document captioned "Petition for Refund", dated March 28, 1941, praying for "a return of the sum of \$20.00, being overpayment in such amount"; and that the said Form 843 was considered by the Commissioner of Internal Revenue to be a claim in abatement and was rejected as such [10] under date of June 17, 1941, in a letter addressed to Griffiths Dairy, Inc.

4. Denies the allegations contained in the concluding paragraph of the complaint and that the complainant is entitled to the relief prayed for in the complaint.

Wherefore, It is prayed that the complaint be dismissed with costs taxed to the plaintiff.

J. CHARLES DENNIS

United States Attorney

Received a copy of the within Answer this 18th day of Sept. 1942.

AUSTIN E. GRIFFITHS

By FREDK R. BURCH

Attorney for Plaintiff.

[Endorsed]: Filed Sept. 18, 1942. [10-A]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 10th day of March, 1943, before the above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury.

The plaintiff appeared by its attorney, Austin E. Griffiths, and the defendant appeared by its attorneys, J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and was represented in Court by Mr. Thomas R. Winter.

A witness was sworn and testimony given on behalf of the plaintiff at the said hearing, documentary evidence and exhibits were introduced and the Court being fully advised in the facts and the law makes the following—

FINDINGS OF FACT

I.

The plaintiff corporation was organized under the laws of the State of Washington, July 5, 1940.

II.

The defendant, Clark Squire, is now and at all times herein mentioned was the duly qualified Collector of Internal Revenue for the collection district of Washington, residing at Tacoma, Washington. [11]

III.

Plaintiff corporation was organized in the manner following: Austin E. Griffiths, Jr., and his wife were for many years, prior thereto, the owners, as a Washington community, of a dairy business in and about Seattle, Washington, known as the Griffiths Dairy, which going business had assets comprised of eleven milk routes, trucks, cans, furniture and other dairy equipment of an estimated value of \$60,685.00. The business at the time of incorporation owed debts on account of the operation of said business in the amount of \$34,780.00. Said Austin E. Griffiths, Jr., was advised by officers of the Reconstruction Finance Corporation, from which Corporation he expected to obtain a loan, to form a corporation by turning over to the Corporation all of the assets of said dairy business. That it was decided to form a corporation to take over the said dairy business for the above purpose as it was thought that the said business might be carried on more advantageously if additional capital was received and particularly if prior creditors of the said business would take stock in full or part payment of their claims. Also that employees would become more interested in plaintiff's business if they became part owners thereof by taking stock therein. No persons, however, subsequent to the incorporation, bought shares of stock in the plaintiff corporation, except as hereinafter stated. There was transferred to M. Clothier 1,000 shares of treasury stock in part payment of a prior debt, and 600 shares to Donald Sell, who was to be employed by plaintiff and when

he ceased to be so employed then his shares to be taken back by plaintiff. The plaintiff corporation was incorporated on July 5, 1940, with an authorized capital of \$50,000, represented by 14,000 shares of no par [12] value stock, classified as preferred stock, and 36,000 shares of no par value stock, classified as common stock. Said Austin E. Griffiths, Jr., his wife and Byron T. Parry were the sole incorporators and the sole and first directors and officers thereof. Parry's stock was in payment of a prior debt or bonus due him. In an offer made to the Board of Directors of plaintiff corporation by Austin E. Griffiths, Jr., dated July 9, 1940, and accepted by the plaintiff corporation in its corporate minutes, assets having an estimated value of \$60,685 were conveyed to the plaintiff corporation by Austin E. Griffiths, Jr., in payment of the entire 50,000 shares of stock which was subscribed for as follows: Austin E. Griffiths, Jr., subscribed for 39,000 shares, Ragna S. Griffiths, his wife, subscribed for 9,000 shares, and Byron T. Parry subscribed for 2,000 shares, which stock had an actual value of \$25,000. However, certificates covering only 28,000 shares of the 50,000 shares subscribed for were issued to Austin E. Griffiths, Jr., Ragna S. Griffiths and Byron T. Parry, and the remainder of this said stock, being 14,000 shares of preferred stock and 8,000 shares of common stock, were donated to the plaintiff corporation by Austin E. Griffiths, Jr., to be and remain in the treasury of of said corporation as and for its own property, fully paid and non-assessable, to be later sold and

delivered for the sole use and benefit of the corporation and for such sum or sums as the Board of Directors may from time to time decide and order. Subsequently, as aforesaid, 1,000 shares and 600 shares of the treasury stock so donated were sold and transferred from the treasury of the plaintiff corporation to M. Clothier and Donald Sell, respectively.

IV.

Upon investigation by the investigating officers and [13] no documentary stamps having been affixed and cancelled with respect to either the original subscription of 50,000 shares, the donation of 22,000 shares to the treasury or the subsequent sale and transfer of 1,600 shares to Clothier and Sell, assessment of the following taxes were made by the Commissioner of Internal Revenue:

On original subscription issue
of 50,000 shares—

| | | | |
|--------------------------|--------------------|---------|----------|
| Austin E. Griffiths, Jr. | 39,000 shares | \$42.90 | |
| Ragna S. Griffiths | 9,000 shares | 9.90 | |
| Byron T. Parry | 2,000 shares | 2.20 | |
| | | | <hr/> |
| | | | \$ 55.00 |

Donation or transfer of

| | | |
|---|-------|-----------|
| 22,000 shares to treasury | ..... | 1100.00 |
| Transfer of 1,000 shares treasury stock to M. Clothier | ..... | 50.00 |
| Transfer of 600 shares treasury stock to Donald Sell | ..... | 30.00 |
| | | <hr/> |
| Total | ..... | \$1235.00 |

V.

On October 17, 1940, and before the taxes were assessed, a sworn protest was filed on behalf of the plaintiff corporation and its incorporators, and subsequent to the assessment and on April 5, 1941, plaintiff corporation filed a claim, Form 843, dated March 24, 1941, requesting abatement of the aforementioned assessment of \$1,235.00, plus penalty and interest of \$170.15. On or about the same date, plaintiff filed an instrument captioned "Petition for Refund," addressed to Commissioner of Internal Revenue, dated March 28, 1941, the last two paragraphs of which read as follows:

"6. Petitioner respectfully represents that a reasonable and lawful Stamp Tax upon said stock taxed by your office, instead of being the sum of \$1,305.00, was and is not to exceed the sum of \$100.00.

"Wherefore, petitioner respectfully prays a return of the sum of \$20.00, being over-payment in such amount." [14]

VI.

On March 24, 1941, plaintiff corporation filed an agreement and also its protest against said tax amount with the Collector of Internal Revenue wherein it agreed to make monthly payments of \$120.00 on the 5th day of each month until the total amount of the tax heretofore assessed and interest shall have been paid.

VII.

That subsequent to the above agreement, but prior to the filing of the claim for abatement, Form 843, and petition for refund, plaintiff corporation had paid to the defendant, Collector of Internal Revenue, on March 24, 1941, the sum of \$120.00 only. However, prior to the commencement of this action, plaintiff made the following payments to the defendant Collector: \$120.00 on May 8, 1941; \$120.00 on June 10, 1941, and \$240.00 on October 8, 1941. The claim for abatement, Form 843, was considered by the Commissioner of Internal Revenue and was rejected by letter to the plaintiff on June 17, 1941. No separate action was taken by the Commissioner with respect to the "Petition for Refund", which was filed on April 5, 1941, and this action was begun on December 23, 1941.

Dated this 17 day of March, 1943.

CHARLES H. LEAVY

United States District Judge

From the foregoing Findings of Fact, the Court makes the following— [15]

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the parties and the subject matter here involved.

II.

That the plaintiff corporation, under Section 1802(a), Internal Revenue Code, as amended, did incur a stamp tax liability of only \$37.50, instead

of \$55.00, assessed on the original subscription of 50,000 shares to Austin E. Griffiths, Jr., Ragna S. Griffiths, his wife, and Byron T. Parry.

III.

That the plaintiff corporation, under Section 1802(b), Internal Revenue Code, as amended, did incur the stamp tax liability of \$1100.00, assessed on the transfer of the right of the original subscriber, Austin E. Griffiths, Jr., to receive the 22,000 shares of stock donated to the treasury of the plaintiff corporation.

IV.

The plaintiff corporation, under Section 1802(b), Internal Revenue Code, as amended, did incur the stamp tax liability of \$80.00, assessed on the transfer of 1,000 shares and 600 shares of treasury stock to M. Clothier and Donald Sell, respectively.

V.

That the defendant is entitled to judgment dismissing the plaintiff's complaint with costs to said defendant.

Dated this 17 day of March, 1943.

CHARLES H. LEAVY

United States District Judge

[16]

Plaintiff excepts to the above findings of fact that said stock had more than a nominal value of \$100.

Plaintiff excepts to conclusions of law numbers II and IV for the above reason.

Plaintiff especially excepts to the Third conclusion of law for the reason there should be in law no assessment or stamp tax on said donation to plaintiff's treasury.

The foregoing exceptions are allowed.

CHARLES H. LEAVY

United States District Judge

Presented by:

HARRY SAGER

Asst. U. S. Atty.

O. K. as to form:

AUSTIN H. GRIFFITHS

Atty. for pltf.

[Endorsed]: Filed Mar. 17, 1943. [17]

In the District Court of the United States for the
Western District of Washington, Northern
Division

No. 454

GRIFFITHS DAIRY, INC.,

Plaintiff,

vs.

CLARK SQUIRE, Collector of Internal Revenue,
Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 10th day of March, 1943, before the

above-entitled Court, Honorable Charles H. Leavy presiding therein, sitting without a jury.

Plaintiff appeared by its attorney, Austin B. Griffiths, and the defendant appeared by its attorneys, J. Charles Dennis, United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, and was represented in Court by Mr. Thomas R. Winter.

A witness was sworn and testimony given on behalf of the plaintiff at the said hearing, documentary evidence and exhibits were introduced and the Court being fully advised in the facts and the law and having made and entered its Findings of Fact and Conclusions of Law herein, now, therefore, it is Ordered, Adjudged and Decreed that the plaintiff's complaint be and the same is hereby dismissed with costs to the defendant to be taxed by the Clerk.

Dated this 17 day of March, 1943.

CHARLES H. LEAVY

United States District Judge

Presented by:

HARRY SAGER

Asst. U. S. Atty.

O.K. as to form:

AUSTIN GRIFFITHS

Atty. for pltf.

[Endorsed]: Filed Mar. 17, 1943. [18]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM FINAL
JUDGMENT

The above named defendant, Clark Squire, and his attorneys of record herein, J. Charles Dennis, United States attorney, and Thomas D. Winter; you and each of you, are hereby notified that notice is hereby given that Griffiths Dairy, Inc., plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth District from the Final Judgment in favor of defendant, Clark Squire, and dismissing plaintiff's Complaint entered in this action on March 18, 1943.

Dated this 9th day of April 1943.

AUSTIN E. GRIFFITHS

Attorney for Plaintiff and
Appellant, Griffiths Dairy,
Inc.

Address: Fourth and Cher-
ry Bldg.,
Seattle, Washington.

Copy received this 9th day of April, 1943.

THOMAS R. WINTER

MO

[Endorsed]: Filed Apr. 9, 1943. [19]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
AND ERRORS ON APPEAL

Appellant assigns the following errors and makes the following statement of points to be relied upon in the above appeal:

Error No. I.

That the Findings of Fact are erroneous in that the Court finds as a fact that all of said stock or shares had more than a nominal value of One Hundred (\$100.00) Dollars.

Error No. II.

That the second, third, fourth, and fifth Conclusions of the Court are erroneous in law because they are not supported by the Findings of Fact.

Error No. III.

That Conclusions of Law No. II. and No. IV. are each erroneous in that plaintiff is found in law to have incurred more than nominal tax upon all of said stock or shares, and in excess of One Hundred (\$100.00) Dollars.

Error No. IV.

That the Court especially erred in Conclusion of Law No. III. for the reason that there is in law no valid assessment or stamp tax upon said donation of 22,000 shares, or upon the right to donate the

same to plaintiff, and therefore said tax of Eleven Hundred (\$1,100.00) Dollars, is void.

AUSTIN E. GRIFFITHS,
Attorney for Plaintiff and
Appellant.

Copy received this 9th day of April, 1943.

THOMAS R. WINTER
MO

[Endorsed]: Filed April 9, 1943. [23]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record on appeal, consisting of pages numbered 1 to 23, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause as is required by Appellant's Designation for Making the Record on Appeal, filed and shown herein, as the same remains of record and on file in the office of the Clerk of the District Court, at Seattle, except Item 6 of Appellant's said Designation for Making the Record on Appeal, there being none filed of record herein, and that the same

constitutes the record on appeal herein from the Judgment of the District Court of the United States for the Western District of Washington, Northern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred by the Clerk for making record and certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

| | |
|--|--------|
| Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return, 66 fol. @ 5c per folio | \$3.30 |
| Appeal fee | 5.00 |
| Clerk's Certificate to Transcript of Rec- ord on Appeal | .50 |
| <hr/> | |
| Total | \$8.80 |

[24]

I further certify that the foregoing fees have been paid by attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 22nd day of April, 1943.

[Seal]

JUDSON W. SHORETT,

Clerk

By E. REDMAYNE,

Deputy [25]

[Endorsed]: No. 10410. United States Circuit Court of Appeals for the Ninth Circuit. Griffiths Dairy, Inc., a corporation, Appellant, vs. Clark Squire, Collector of Internal Revenue, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed April 26, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT ¹⁴

GRIFFITHS DAIRY, INC.,

Appellant.

VS.

CLARK SQUIRE, as Collector of INTERNAL
REVENUE, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

Brief of Appellant

AUSTIN E. GRIFFITHS,

Attorney for Appellant.

Fourth and Cherry Bldg.,
Seattle Washington.

FILED

JUN 23 1943

PAUL P. O'BRIEN,
CLE

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INDEX

| | <i>Page</i> |
|---------------------------------|-------------|
| Statement of Jurisdiction | 1 |
| Statement of Case | 4 |
| Specification of Errors | 11 |
| Summary | 11 |
| Argument | 14 |

TABLE OF CASES

| | |
|--|----|
| Commercial Credit Co. vs. Tait 2 Fed. 2d. 862..... | 23 |
| Corporation of America vs. McLaughlin | |
| 100 Fed. 2d. 72, 78 | 22 |
| Founders General Corporation vs. Hoey | |
| 300 U. S. 268, 57 S. Ct. 457. 80 L. Ed. 639..... | 20 |
| Intercoast Trading Co. vs. McLaughlin | |
| 18 Fed. Supp. 149 | 22 |
| Maloney vs. Portland Associates, Inc. | |
| 109 Fed. 2d. 124 | 22 |
| Rogers vs. Strong, 72 Fed. 2d. 455 | 24 |
| Orpheum Bldg. vs. Anglin, 127 Fed. 2d. 478, 485..... | 24 |
| White Consolidated Equities, 78 Fed. 2d 435..... | 22 |
| W. T. Grant Co. vs. Duggan, 94 Fed. 2d. 859 | 23 |
| Raybestos Manhattan Co. vs. U. S. 285. U. S. 60, | |
| 56 S. Ct. 65. 80 L. Ed. 44 | 10 |

STATUTES

| | |
|---|------|
| Internal Revenue Code, Sect. 1800 | 3-14 |
| and 1802 and 3772 | 3-14 |
| 28 U. S. C. A. Sect. 225 | 3 |

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GRIFFITHS DAIRY, INC.,

Appellant.

vs.

CLARK SQUIRE, as Collector of INTERNAL
REVENUE,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

Brief of Appellant

STATEMENT OF JURISDICTION.

This action seeks to recover from appellee, documentary stamp taxes alleged to be unlawfully assessed amounting to \$1235 plus penalty and interest of \$170 paid or to be paid appellee, or such lesser sum as the court should decide recoverable. R. 2, 8, 9, 11, 16.

Request for Abatement and Petition for Refund were made April 5, 1941. Objection to the tax was made before and after assessment of it. R. 16.

Written agreement to pay the above sum was made under protest March 24, 1941, of which \$120 was then paid and over \$700 in all has now been paid. R. 16, 17.

The complaint is practically admitted by the formal answer. Its allegations are substantially set out in the Findings of Fact. R. 13, 17.

The case was tried by Honorable Charles L. Leavy March 10, 1943.

The court found that stamp tax A, as classed herein, should be reduced from \$55 to \$37.50. R. 17.

But that stamp tax B of \$1100 and stamp tax C of \$80 were lawfully assessed. R. 18. Findings of Fact and Conclusions of Law were made and complaint dismissed with costs, March 18, 1943.

April 9th appellant filed Notice of Appeal with cost bond. R. 21.

Designation of Errors and Designation of Record were served and filed. R. 22.

The case was docketed in this court April 26, 1943. R. 25.

Jurisdiction for this case and appeal is under section 1802 (A and B) Internal Revenue Code, as amended, and 28 U. S. C. A., Section 41. 26 U. S. C. A., page 41-321-2. Section 3772 Internal Revenue Code. 28 U. S. C. A., Section 225.

STATEMENT OF THE CASE

Appellant, a dairy corporation, brought this suit against appellee as Collector of Internal Revenue to abate, refund, or recover \$1235 plus interest and penalty of \$170 for documentary stamp tax, paid or payable, illegally assessed against appellant (1st) on no par value stock subscription, (2nd) on 22,000 of such shares given unrestrictedly to the corporation, or as stated by the court, "on" the alleged "transfer of the right of the original subscriber, to receive such shares donated to the corporation treasury," and not issued to him, and (3rd) on later transfer of part of such donated stock; and which sums were agreed under protest to be paid \$120 monthly, and thereunder more than \$700 has been paid; or to recover such lesser sum as the court should adjudge an unlawful assessment, and to determine the value of the stock. R. 9.

Appellant contended the stock had no market value and only nominal value of \$100 and that all over that sum paid or agreed to be paid was illegal exaction. R. 8, 16. The dispute has been the lawful amount.

The capital stock of appellant was \$50,000, being 50,000 shares no par value, payable in dairy property and routes, estimated worth about \$60,000, subject to debts payable by appellant of about \$35,000.

This action, then, is to adjudge the valid documentary stamp tax against:

A. Original subscription of 50,000 shares, of which only 28,000 were issued, and which subscription was taxed \$55. R. 15, 17.

B. A "donation" of 22,000 shares of the subscribed stock to appellant, and which gift, or the assumed "transfer of the right of Griffiths to receive these shares," was taxed \$1100. R. 15, 18.

C. The 1600 shares later issued by appellant from said donation, taxed at \$80. R. 15, 18.

Appellee added penalty and interest of \$170, in all \$1405.

The case comes within section 1802 of Internal Revenue Code as amended.

The main facts are: Griffiths, Jr. and wife owned a dairy business. They estimated it worth \$60,000 subject to debts of about \$35,000. They were advised their credit would improve if they incorporated. The Federal R. F. C., from which they expected a loan, so counselled them. Creditors promised to take stock on their debts; employees said they would take stock while employed by the corporation. R. 3, 5, 13.

Accordingly, July 5, 1940, appellant incorporated.

The stock was paid by dairy property estimated at \$60,000, of which \$24,000 represented milk routes, appellant to pay the debts. R. 3, 13.

Griffiths and wife subscribed for 48,000 and one Parry who was working for Griffiths subscribed 2000 shares.

Griffiths donated appellant 22,000 of those he subscribed for.

The donation was "And the remainder of this said stock, being 14,000 shares of preferred and 8000 shares of common stock, shall be and remain in the treasury of said corporation as and for its own property, fully paid and non-assessable, to be later sold for the sole use and benefit of the corporation and for such sum or sums as the Board of Directors may from time to time decide and order." R. 14.

None of the donation has been transferred except 1000 shares to reduce the debt of Clothier \$1000 and upon the understanding that appellant buy dairy supplies from Clothier, and 600 shares to Sell on condition that he be employed by appellant, and when he ceased such employment, appellant take back the shares for \$600. R. 13, 15.

Said 22,000 shares were not issued to Griffiths and returned to appellant. The gift stock was to be issued any time, at any price, to anyone, at will of appellant. There was no nominee or direction or control of this stock by Griffiths. R. 14.

Parry's subscription was on account of debt due him as employee and assumption he would remain employed.

The stock had no market value, only restricted or nominal value.

Further, Griffiths and wife were virtual owners of appellant. The corporation failed in its purposes. It was a family concern. The transaction, excepting Parry, Clothier and Sell, was giving property for shares representing the property, all in the family.

POINTS

First. Appellant's chief position, bone of the case, is the illegal exaction of \$1100 upon said donation.

Nevertheless, if any tax on said donation be valid, then appellant contends that the lawful basis of such tax was its market value, and there being no market value, then its real value for tax purposes would be nominal, or such value as considered judgment would attach to this stock in the light of attendant circumstances.

Second. It is next maintained that the right tax basis on 50,000 shares subscription, was a nominal value instead of \$1 per share on which the tax was based, amounting to \$55.

Third. That the right tax basis on 1600 shares issued from said donation, was nominal and not \$1 per share on which the tax of \$80 was based.

In any event, appellant maintains there should be no gift tax or, as stated by the court "On the transfer of the right of the original subscriber, Griffiths, to receive the 22,000 shares of stock donated to the treasury of plaintiff corporation," and that the \$1100 tax was arbitrary exaction and not taxation of property.

The evidence is omitted because of much cost and because appellant deems the facts found by the Trial Court do not sustain the Conclusion of Law, especially No. 3 which validates the \$1100 tax on the naked gift stock, and because this conclusion is contrary to law.

The Trial Court in third Findings of Fact followed closely the foregoing outline:

FINDINGS OF FACT

"Plaintiff corporation was organized in the manner following: Austin E. Griffiths, Jr. and his wife were for many years, prior thereto, the owners, as a Washington community, of a dairy business in and about Seattle, Washington, known as the Griffiths Dairy, which going business had assets comprised of eleven milk routes, trucks, cans, furniture and other dairy equipment of an estimated value of \$60,685. The business at the time of incorporation owed debts on account of the operation of said business in the amount

of \$34,780. Said Austin E. Griffiths, Jr., was advised by officers of the Reconstruction Finance Corporation, from which Corporation he expected to obtain a loan, to form a corporation by turning over to the Corporation all of the assets of said dairy business. That it was decided to form a corporation to take over the said dairy business for the above purpose as it was thought that the said business might be carried on more advantageously if additional capital was received and particularly if prior creditors of the said business would take stock in full or part payment of their claims. Also that employees would become more interested in plaintiff's business if they became part owners thereof by taking stock therein. No persons, however, subsequent to the incorporation, bought shares of stock in the plaintiff corporation, except as hereinafter stated. There was transferred to M. Clothier 1,000 shares of treasury stock in part payment of a prior debt, and 600 shares to Donald Sell, who was to be employed by plaintiff and when he ceased to be so employed, then his shares to be taken back by plaintiff. The plaintiff corporation was incorporated on July 5, 1940, with an authorized capital of \$50,000. represented by 14,000 shares of no par value stock, classified as preferred stock, and 36,000 shares of no par value stock, classified as common stock. Said Austin E. Griffiths, Jr., his wife and Byron T. Parry were the sole incorporators and the sole and first directors and officers thereof. Parry's stock was

in payment of a prior debt or bonus due him. In an offer made to the Board of Directors of plaintiff corporation by Austin E. Griffiths, Jr. dated July 9, 1940, and accepted by the plaintiff corporation in its corporate minutes, assets having an estimated value of \$60,685. were conveyed to the plaintiff corporation by Austin E. Griffiths, Jr., in payment of the entire 50,000 shares of stock which was subscribed for as follows: Austin E. Griffiths, Jr., subscribed for 39,000 shares, Ragna S. Griffiths, his wife, subscribed for 9,000 shares, and Byron T. Parry subscribed for 2,000 shares, which stock had an actual value of \$25,000. However, certificates covering only 28,000 shares of the 50,000 shares subscribed for were issued to Austin E. Griffiths, Jr., Ragna S. Griffiths and Byron T. Parry, and the remainder of this said stock being 14,000 shares of preferred stock and 8,000 shares of common stock, were donated to the plaintiff corporation by Austin E. Griffiths, Jr. to be and remain in the treasury of said corporation as and for its own property, fully paid and non-assessable, to be later sold and delivered for the sole use and benefit of the corporation and for such sum or sums as the Board of Directors may from time to time decide and order. Subsequently, as aforesaid, 1,000 shares and 600 shares of the treasury stock so donated were sold and transferred from the treasury of the plaintiff corporation to M. Clothier and Donald Sell, respectively." R. 13.

SPECIFICATION OF ERRORS

No. 1. Conclusions of Law 2, 3, 4 and 5 are erroneous, not supported by the Findings of Fact.

No. 2. Conclusions of Law 2 and 4 are erroneous because appellant is charged with more than a nominal tax on all the stock, and in excess of \$100 originally paid.

No. 3. Conclusion No. 3 is especially erroneous because in law there is no stamp tax upon said naked donation, or as it is phrased "on the transfer of the right of Griffiths, Jr. to receive the 22,000 shares of stock donated to the treasury of the corporation" and therefore the \$1100 tax is void.

No. 4. The court erred in rendering judgment against appellant dismissing complaint with costs.

SUMMARY.

1. Appellant maintains that the Findings of Fact show that due to conditions attending this incorporation and stock payment by property of uncertain value and subject to debts, there was no fixed or market value for it, and therefore, the stock value would be nominal which appellant has affirmed should not exceed \$100. That the character of the incorporation stock purchase and payment, especially required appellee to obey the statute and to ascertain the "actual value" of the shares to which the unit of \$20 or frac-

tion thereof" applied, and therefore appellee was wrong in assuming an arbitrary value of \$1 per share and making an assessment upon that basis.

2. Appellee valued each share \$1 and on that basis taxed Class A subscription \$55 and Class B—gift of 22,000 unissued shares from stock subscribed, \$1100, and Class C 1600 shares later issued by appellant from the gift stock to creditor Clothier and employee Sell, \$80.

3. The Trial Court found because of \$35,000 debts, the stock could not be valued above \$25,000 and reduced the tax of \$55 on Class A stock to \$37.50, but refused to reduce the taxable basis of Class B and C shares.

Appellant contends appellee's valuation disregarded the statute which requires the "actual value" of this stock to be found, and that the court should have reduced B and C class shares at least to his valuation of Class A. It is the same stock, same company, same market. No one would take it except creditors or employees moved by their special interests.

Moreover, all stock was paid for by Griffiths and wife. The only subscribed stock issued was 600 shares to them, 2000 shares to Parry, an employee, and these three were sole incorporators and officers.

The unissued 22,000 shares were given by Griffiths to the company without nominee or direction for its disposal.

Later, the company issued Class C shares to creditor Clothier and worker Sell and their 1600 shares were taxed \$80.

4. The only question as to A and C stock is basis of their valuation, which having a nominal value because of limited or no market should be taxed accordingly.

5. But Class B gift shares \$1100 tax should be held void.

6. The gift stock, according to appellee, has been and will be taxed three times; its part of subscription tax of \$55 or \$24.20; second, as a gift \$100; third, when later issued to Clothier and Sell, \$80, and the remainder, 20,400 shares, whenever issued, \$1020.

Thus appellee charges it a direct tax of \$2200 plus part of the \$55.

If Griffiths had kept it and sold it to anyone later, it would have been taxed, of course, again, but only twice.

Although this stock was not issued to Griffiths, who could have taken it with no added expense, it was as a gift assessed higher than if it had been so issued and later sold by him to anyone else. If Griffiths had taken it and later transferred it to a "custodian" it would not be taxable.

In brief, this stock to be taxable, should be actually issued or authorized to be issued.

On the contrary, Griffiths gave it as a part of the formation of the company. The right was given before stock was created. Without it there would have been no company. Griffiths having given it had nothing left "to receive."

The collector's action, appellant respectfully submits, is not warranted by any law, and is confiscation.

ARGUMENT.

The controlling statutes are sections 1800 and 1802, Internal Revenue Code as amended. The 1940 act passed just before appellant was formed, lifted rates to those applied.

STATUTES

See also Treasury Department Regulations 71 for 1932 and 1941.

See also Treasury Department Statutes, Regulations 71 for 1932 and 1941.

The following parts apply mainly to stamp tax of no par value stock, issues and transfers.

Section 1800. *** There shall be levied, collected and paid, for and in respect of the several *** certificates of stock *** and things mentioned in Schedule A of this title, or for in respect of the *** paper which such instruments *** or things *** are written, by any person who makes, signs, issues, sells *** the same, or for whosce use or benefit the same are made, signed, issued, or sold ***, the several taxes specified in such sections.

CAPITAL STOCK ISSUES

Section 1802-A: Capital stock *** issue: On each original issue *** by any corporation *** holding or dealing in any of the stock mentioned in this sub-section or section 1801 *** on each \$100. of par or face value *** of the certificates issued by such corporation *** (or of the shares where no certificates were issued) 11 cents: Provided, That when such shares or certificates are issued without par or face value, the tax shall be 11 cents per share *** unless the actual value is in excess of \$100. per share, in which case the tax shall be 11 cents on each \$100. of actual value *** of such certificates (or of the shares where no certificates were issued) or unless the actual value is less than \$100. per share, in which case the tax shall be 3 cents on each \$20. of actual value, or fraction thereof, of such certificates (or of the shares where no certificates were issued).

(Regulation Article 25 says: "Stock is deemed issued when *** the subscription is accepted).

(Article 27 says: "Where a certificate represents more than one share *** , the actual value of the certificate *** issued without par or face value is the measure of the tax and not *** the actual value of each separate share which the certificate represents.

"Where shares are issued without certificates, the par or face value or the actual value (as the case may be) of each share is the measure of the tax.

“The tax, on original issue, is measured not by the amount paid in, on, or for the stock, but by *** the actual value in the case of stock without par or face value.

“In the case of stock without par or face value, the actual value of the stock is to be determined by the market price at the time of issue).”

STOCK SALES AND TRANSFERS

Section 1802-B: Capital stock *** sales or transfers: On all sales *** of, or transfers of legal title to any of the shares or certificates mentioned in section A, or to rights to subscribe for or to receive such shares or certificates, *** 5 cents, and where such shares or certificates are without par or face value, the tax shall be 5 cents on the transfer or sale *** on each share ***: Provided, That in case the selling price, if any, is \$20. or more per share, the above rate shall be 6 cents ***. (Several exemptions are here omitted.).

Provided, further, That *** every bill or memorandum of sale *** before mentioned shall show the date thereof, the name of the seller, the amount of the sale, and the matter or thing to which it refers. (Then follows penalty for tax non-payment by any person).

(Regulation Art. 31 says: *** “The tax accrues at time of making the *** transfer of the legal title to *** receive such stock, regardless of the time or manner of the delivery of the certificates or agreement or memorandum of sale).

POSITIONS

Our position is, first. That the gift tax is not covered by the statute; should not be construed to be covered. Congress should not be presumed to intend such an unnecessary, unseemly tax upon lawful business, a tax exceptional, prohibitive, destructive of the source it lives on. In this instance this small business was throttled at the start by this unexpected, excessive tax.

Second. If the gift tax be valid, then the basis on which the amount of the tax is computed should be actual or nominal value.

Third. If the gift tax, or the Griffiths right to receive these shares tax, be valid, then the basis, even if assumed to be face value of \$1. per share, should be \$20. unit into 2200, or 1100 units at 5c each, or in all, \$55.

Appellee taxes the gift stock under paragraph B of section 1800 without reference to paragraph A. of this section. Appellee used the unit \$20. as to the subscription tax only. It is appellant's contention that in the matter of stock sales and transfers under paragraph B, the kind of no par stock or sales to be taxed is described and defined in paragraph A. Paragraph B applies to shares described in paragraph A and is controlled by that paragraph in reaching the amount of tax.

It is said in B that the taxes on the shares "described in A" shall be ***. As to par stock, the unit \$100. is used, but as to no par shares, the unit \$20. is not carried forward. The whole section should be construed together and the unit or divisor \$20. used in both paragraphs A & B. In that case the unit \$20. divided into 22,000 shares would yield 1100 units, which at 5c per share unit would yield \$55. in tax instead of \$1100.

Fourth. Appellee first assessed the gift as follows: "Donation or transfer of 22,000 shares to treasury, \$1100." Later the court called it a tax on "The transfer of the right of the subscriber to receive the 22,000 shares" so donated.

But in any case, there is wrongful, double taxation of the same matter. Its share of the subscription tax is \$24.20. Then while at rest, without business movement, it is taxed \$1100.

Regulation 71, Article 25, says: "Stock is deemed issued when subscription is accepted." If that is so, then when Griffiths subscribed for this stock, it was issued to him. Why, then, having paid \$24.20 for subscription tax, should this gift bear a further tax of \$1100. upon his alleged transfer to the company of his right to receive these given shares?

Fifth. The court on class A stock issue fixed the basic value at \$25,000. instead of \$50,000. as perfunc-

torily assumed by appellee. The tax on the whole subscription was \$20. into \$25,000. or 1250 units at 3 cents, or \$37.50.

Appellant contends, as above stated, that section 1800 A and B should be considered together. In that case the tax on all of the gift shares when sold would be at 5 cents per share or \$62.50, and on class C 1800 shares sold, only \$4.50 instead of \$80. imposed by appellee.

It would result from this computation that the total lawful tax should be \$42. and adding gift tax of \$55. then \$97. and not \$1,235.

The Regulations refer, it is submitted, to ordinary active stock transactions, not to a matter that starts the corporation.

Regulation Art. 25, Section 113 says: "The issue of rights to subscribe for unissued stock" is not taxable.

Regulation Art. 77 says: "The tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale." In the present case a debt burden of \$35000. rested on 50,000 shares.

AUTHORITIES

Counsel has been unable to find a case in point on all aspects of this one.

Upon the question of liability to pay, appellee in the Trial Court relied upon the following and kindred cases.

Appellant maintains these cases, when examined with reference to their facts, do not sustain appellant's action, particularly the \$1100. assessment upon the donation.

Raybestos-Manhattan Co. vs. U. S. 296 U. S. 60.
56 S. Ct. 63. 80 L. Ed. 44.

In this case two of the corporations which formed a third directed assignments of their stock to their past stock holders. No gift was involved. This direction, the court held, was the same as a transfer from the old corporation.

But in the case at bar, the right to the 22,000 shares was a gift, no direction was given to issue it to anyone. No privity of contract was retained.

Founders General Corporation vs. Hoey 300 U. S.
268. 57 S. Ct. 457. 80 L. Ed. 639.

In this case the tax payers authorized their nominees to receive the stock. The subscription tax was paid or admitted, but the later or second tax on the shares when issued to the nominee, was disputed.

In the above case the stamp tax was only paid twice; once when the subscription was paid, second, when the stock was issued or directed to be issued to the nominees.

In the pending case, the subscription tax is admitted, except as to basis and amount. But here, appellant is required to pay three times on the same stock; once when subscribed, which is right, second when donated to the corporation, which is wrong, and third when later sold to anyone.

Actually, appellee exacts \$1100 on shares not issued, and later would collect \$80. on 1600 shares issued to Clothier and Sell, and would collect another \$1100 whenever the residue of the gift were sold.

In the cited and related cases, it will be observed there was no treasury stock, no gift to the corporation, no double tax on any donation, and a later tax on an issue therefrom. There was only the issue tax and another tax incurred when the stock was issued to specified stock holders of the old corporation or to designated nominees of the real owners of the stock.

Briefly, the Raybestos case holds that when at the instance of one entitled to receive stock, the certificates are at his request and for his convenience issued by the corporation in the name of a nominee who receives no beneficial interest thereon, the transaction involves a transfer by the beneficial owner which is taxable. Here it will be noted there was a completed transfer from one person to another.

In the Founders case the court says: "The legal title to the shares was received by the nominee from the newly formed corporation; but the authorization rendering his holding lawful was received from the tax

payer. The legality of the issuance of the stock in the names of the nominees rests on the fact that the tax payers authorize such issuance and granted their nominees the right to receive the stocks entered in their names. The grant of that authority is a transfer of 'The right to receive within the meaning of the act.'

Notwithstanding some broad dictum in the foregoing cases, it is clear their facts are essentially different from the instant case and that the right to receive passed, directly or indirectly, from one to another, the corporation being a medium of the transfer. There was no unqualified gift to the corporation.

' It is believed the following authorities support appellant's right to recover.

White vs. Consolidated Equities, 78 Fed. 2d. 435.

Herein it is held no double taxation of shares is lawful. There must be definite purchase of stock. The stamp tax law is not to be strained.

Corporation of America vs. McLaughlin, 100 Fed. 2d. 72, 78.

Maloney vs. Portland Associates, Inc. 109 Fed. 2d. 124.

Intercoast Trading Co. vs. McLaughlin, 18 Fed. Supp. 149.

This case deals with the taxable value of stock. This is a question of actual value under the circumstances of the corporation involved. The court set aside a treasury regulation as being contrary to fundamental facts.

W. T. Grant Co. vs. Duggan, 94 Fed. 2d. 859.

This case, like the McLaughlin case, had to do with no par stock. It was ruled that stock value could be proved by its market value. This case indicates the care that should be taken in stamp tax values, whether upon certificates or shares.

Commercial Credit Co. vs. Tait, 2 Fed. 2d. 862.

Affirmed - 7 Fed. 2d. 10222.

Held that no par value stock depends for stamp tax purposes upon the facts and circumstances of each corporation issuing it. And the Court justly ruled that tax confiscation is not due process of law guaranteed by the Fifth Amendment.

Merchants National & Savings Bank vs. U. S.
101. Fed. 2d. 399.

Held stock not taxable because not on an independent transfer from one person to another.

Seattle First National Bank vs. U. S. 33. Fed.
Supp. 603.

Held no taxable transfer. And that Treasury rules should be reasonable and that collector should use care and caution.

Rogers vs. Strong, 72 Fed. 2d. 455.

Herein "Fair value" of stock is held to be reality rather than stock exchange quotations.

Orpheum Bldg. vs. Anglin, 127 Fed. 2d. 478, 485.

Herein it is held judgment or care must be used by the collector in stock valuation and that there must be some sort of complete transfer in order to warrant a tax.

It is respectfully submitted that appellant is entitled to the redress the law allows when it appears that a tax has been "Unjustly assessed or is excessive in amount, or in any manner wrongfully collected."

WHEREFORE, appellant prays for reversal of the judgment complained of and for such other judgment as may be just and lawful.

AUSTIN E. GRIFFITHS,

Attorney for Appellant.

IN THE
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Circuit Court of Appeals
FOR THE NINTH CIRCUIT

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Appellant

v.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

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HONORABLE CHARLES H. LEAVY, *Judge*

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1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

FILED
JUL 21 1943

PAUL P. O'BRIEN,

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INDEX

| | PAGE |
|--|------|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| QUESTIONS PRESENTED | 3 |
| STATUTES INVOLVED | 4 |
| STATEMENT | 4 |
| SUMMARY OF ARGUMENT | 10 |
| ARGUMENT: | |
| I. This Court is without jurisdiction in this proceeding except to the extent of the taxpayer's claim for the refund of \$20 documentary stamp taxes | 13 |
| II. In any event, the stamp tax assessed on the original issue of 50,000 shares was proper | 18 |
| III. Griffiths' donation of 22,000 shares as treasury stock to the taxpayer constituted a taxable transfer of "rights * * * to receive such shares" within the meaning of Section 1802(b), Internal Revenue Code, as amended | 21 |
| IV. The taxpayer's sales and transfer of 1,600 shares of its treasury stock to Clothier and Sell constituted taxable transfers | 25 |
| CONCLUSION | 26 |
| APPENDIX | 28 |

CITATIONS

CASES:

| | PAGE |
|--|--------|
| <i>American Gas Machine Co. v. Willcuts</i> , 87 F. (2d) 924 | 24 |
| <i>Balto. & Ohio R.R. v. United States</i> , 260 U.S. 565 | 17 |
| <i>Canal Bank v. Hudson</i> , 111 U.S. 66..... | 20 |
| <i>Commissioner v. Burdette</i> , 69 F. (2d) 410.... | 20 |
| <i>Commissioner v. Crescent Leather Co.</i> , 40 F. (2d) 833 | 20 |
| <i>Commissioner v. Gerard</i> , 75 F. (2d) 542 | 20 |
| <i>Commissioner v. Neaves</i> , 81 F. (2d) 947..... | 20 |
| <i>Dalton Foundries v. United States</i> , 56 F. (2d) 483 | 18 |
| <i>Electric Storage Battery Co. v. McCaughn</i> , 54 F. (2d) 814 | 18 |
| <i>Founders General Co. v. Hoey</i> , 300 U.S. 268.... | 24 |
| <i>Hearn, James A., & Son v. United States</i> , 8 F. Supp. 698, certiorari denied, 294 U.S. 722.. | 16 |
| <i>Israelite House of David v. Holden</i> , 14 F. (2d) 701 | 15 |
| <i>Jewett & Co. v. United States</i> , 19 F. Supp. 363.. | 16 |
| <i>Kemper Military School v. Crutchley</i> , 274 Fed. 125 | 15 |
| <i>Maloney v. Portland Associates</i> , 109 F. (2d) 124 | 24 |
| <i>Old Mission P. Cement Co. v. Commissioner</i> , 69 F. (2d) 676 | 20 |
| <i>Osborn v. United States</i> , 54 F. (2d) 824..... | 18 |
| <i>Prey Bros. Live Stock Commission Co. v. Commissioner</i> , 36 F. (2d) 326..... | 20, 21 |
| <i>Raybestos-Manhattan Co. v. United States</i> , 296 U.S. 60 | 24 |
| <i>Richards v. Robin</i> , 175 App. Div. 296, affirmed, 225 N.Y. 719 | 22, 23 |
| <i>Richardson v. Shaw</i> , 209 U.S. 365 | 22 |

CITATIONS (Continued)

| | PAGE |
|---|--------|
| <i>Rock Island &c R.R. v. United States</i> , 254 | |
| U.S. 141 | 13, 15 |
| <i>Standard Oil Co. of California v. United States</i> , | |
| 90 F. (2d) 571 | 24 |
| <i>Tidwell v. Anderson</i> , 72 F. (2d) 684..... | 20 |
| <i>United States v. Brown Fence & Wire Co.</i> , 9 F. | |
| Supp. 1008, affirmed, 88 F. (2d) 1005.... | 24 |
| <i>United States v. Revere Copper & Brass</i> , 100 | |
| F. (2d) 391 | 24 |
| <i>United States v. Vortex Cup Co.</i> , 84 F. (2d) 925 | 24 |
| <i>Woolworth, F. W., Co. v. United States</i> , 15 F. | |
| Supp. 679, reversed, 91 F. (2d) 973, certio- | |
| rari denied, 302 U.S. 768 | 18 |

STATUTES:

Internal Revenue Code:

| | |
|---|--------------------------|
| Sec. 1802, as amended (U.S.C. 1940 ed., Title | |
| 26, Sec. 1802) .2, 3, 9, 19, 21, 24, 25, 26, 28, 29 | |
| Sec. 3770, as amended (U.S.C. 1940 ed., Title | |
| 26, Sec. 3770) | 15 |
| Sec. 3772 (U.S.C. 1940 ed., Title 26, Sec. | |
| 3772) | 2, 3, 13, 16, 18, 29, 30 |
| Revised Statutes, Sec. 3226, as amended..... | 16 |

MISCELLANEOUS:

| | |
|--|----|
| Federal Rules of Civil Procedure, Rule 52..... | 20 |
|--|----|

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BRIEF FOR THE APPELLEE

OPINION BELOW

The only opinion in this case is that included in the District Court's Findings of Fact and Conclusions of Law (R. 12-18), which is not reported.

JURISDICTION

This is an appeal taken by Griffiths Dairy, Inc.,

from the judgment entered March 17, 1943, by the District Court in favor of the Collector of Internal Revenue, dismissing the taxpayer's complaint with costs to the Collector. (R. 19-20.) The judgment was entered in an action, tried without a jury (R. 12), filed by the taxpayer on December 23, 1941, for the abatement of documentary or stamp taxes assessed against and partially paid by the taxpayer in 1941 in the sum of \$1,235, plus penalties and interest of \$170.15, and also for the refund of like taxes in the amount of \$20¹ (R. 2-11). The action arose under the provisions of Section 1802(a) and (b) of the Internal Revenue Code, as amended by Section 1 of the Revenue Act of 1939, and jurisdiction was vested in the District Court under the provisions of Section 24, Fifth, of the Judicial Code, as amended, and Section 3772(a) (1) and (2) of the Internal Revenue Code

¹Stamp taxes were assessed against the taxpayer in the total sum of \$1,235 in 1941, and the taxpayer paid \$600 thereof in installments during that year. (R. 6, 10-11, 15.) The taxpayer, however, filed claim for the abatement of \$1,235, plus penalty and interest of \$170.15, which was rejected by the Commissioner of Internal Revenue on June 17, 1941; and also a claim for the refund of the alleged overpayment of only \$20, upon which no separate action was taken by the Commissioner before or after commencement of this suit on December 23, 1941. (R. 11, 16, 17.) Consequently there can be involved in this proceeding only the latter amount covered by the claim for refund, a matter dealt with hereinafter.

(to the extent of the amount of \$20 specified in the claim for refund). The case is brought to this Court by notice of appeal filed April 9, 1943. (R. 21.) Jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the provisions of Section 3772(a) (1) and (2), Internal Revenue Code, this Court has jurisdiction in this proceeding except to the extent of the taxpayer's claim for the refund of \$20 documentary or stamp taxes allegedly overpaid in 1941.

2. Whether the documentary or stamp tax assessed against the taxpayer under the provisions of Section 1802(a), Internal Revenue Code, as amended, on the original issue of 50,000 shares of its stock for assets conveyed to it by its incorporators in 1940, was proper.

3. Whether the donation by Austin E. Griffiths, Jr., the taxpayer's principal stockholder, of 22,000 of his original subscription for 39,000 shares of the taxpayer's stock, to the taxpayer as treasury stock, constituted a taxable transfer of rights to receive such shares within the meaning of Section

1802(b), Internal Revenue Code, as amended.

4. Whether the taxpayer's sale and transfer of 1,000 and 600 shares of its treasury stock to M. Clothier and Donald Sell, respectively, constituted taxable transfers within the meaning of Section 1802(b), Internal Revenue Code, as amended.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts were found by the District Court substantially as follows (R. 12-17):

Griffiths Dairy, Inc. (hereafter called the taxpayer), was organized under the laws of the State of Washington on July 5, 1940, in the following manner: Austin E. Griffiths, Jr. (hereafter called Griffiths), and his wife were for many years prior thereto the owners, as a Washington community, of a dairy business in and about Seattle, Washington, known as the Griffiths Dairy. It was a going business and had assets comprising 11 milk routes, trucks, cans, furniture and other dairy equipment of an estimated value of \$60,685. The business at the time of incorporation owed debts on account of the operation of the

business in the amount of \$34,780. Griffiths was advised by officers of the Reconstruction Finance Corporation, from which he expected to obtain a loan, to form a corporation by turning over to it all of the assets of the dairy business. It was decided therefore to form a corporation to take over the dairy business for the above purpose as it was thought that the business might be carried on more advantageously if additional capital was received, and particularly if prior creditors of the business would take stock in full or part payment of their claims. It was also thought that employees would become more interested in the taxpayer's business if they became part owners by taking stock therein. No persons, however, subsequent to the incorporation, bought shares of stock in the corporation, except as stated hereinafter. There was transferred to M. Clothier 1,000 shares of treasury stock in part payment of a prior debt, and 600 shares to Donald Sell, who was to be employed by the taxpayer, and if he ceased to be so employed then his shares were to be taken back by the taxpayer. (R. 12, 13-14.)

The taxpayer corporation was incorporated on July 5, 1940, with an authorized capital of \$50,000, represented by 14,000 shares of no par value stock, classified as preferred stock, and 36,000 shares of no

par value stock, classified as common stock. Griffiths, his wife, and Byron T. Parry were the sole incorporators and the sole and first directors and officers thereof. Parry's stock was in payment of a prior debt or bonus due him. Pursuant to an offer made to the taxpayer's board of directors by Griffiths on July 9, 1940, and accepted by the taxpayer in its corporate minutes, assets having an estimated value of \$60,685 were conveyed to the taxpayer by Griffiths in payment of the entire 50,000 shares of stock. (R. 14.)

The stock was subscribed for as follows: Austin E. Griffiths, Jr., subscribed for 39,000 shares, Ragna S. Griffiths, his wife, subscribed for 9,000 shares, and Byron T. Parry subscribed for 2,000 shares, which stock had an actual value of \$25,000. However, certificates covering only 28,000 of the 50,000 shares subscribed for were issued to Griffiths, his wife, and Parry, and the remainder, 14,000 shares of preferred and 8,000 shares of common, was donated to the taxpayer by Griffiths to be and remain in the taxpayer's treasury as and for its own property, fully paid and nonassessable, to be later sold and delivered for the sole use and benefit of the corporation and for such sum or sums as the board of directors may from time to time decide and order. Subsequently, certificates

for 1,000 shares and 600 shares of the treasury stock so donated were sold and transferred from the treasury of the taxpayer to M. Clothier and Donald Sell, respectively, as previously stated. (R. 14-15.)

Upon investigation by revenue officers, it was ascertained that no documentary stamps had been affixed and cancelled with respect to either the original subscription of 50,000 shares, the donation of 22,000 shares to the treasury, or the subsequent sale and transfer of 1,600 shares to Clothier and Sell. Accordingly, assessments of the following taxes were made by the Commissioner of Internal Revenue on January 29, 1941 (R. 15):

| | | |
|---|---------------|-----------|
| On original subscription issue of 50,000 shares— | | |
| Austin E. Griffiths, Jr. | | |
| ..... | 39,000 shares | \$42.90 |
| Ragna S. Griffiths | | |
| ..... | 9,000 shares | 9.90 |
| Byron T. Parry. | 2,000 shares | 2.20 |
| | | <hr/> |
| | | \$ 55.00 |
| Donation or transfer of | | |
| 22,000 shares to treasury..... | | 1100.00 |
| Transfer of 1,000 shares treasury | | |
| stock to M. Clothier | | 50.00 |
| Transfer of 600 shares treasury | | |
| stock to Donald Sell | | 30.00 |
| | | <hr/> |
| Total | | \$1235.00 |

On October 17, 1940, before the taxes were assessed, a sworn protest was filed on behalf of the taxpayer and its incorporators, and on April 5, 1941, subsequent to the assessment, the taxpayer filed a claim (Form 843) dated March 24, 1941, requesting abatement of the above-mentioned assessment of \$1,235 plus penalty and interest of \$170.15. On or about the same date, that is, April 5, 1941, the taxpayer filed an instrument captioned "Petition for Refund", addressed to the Commissioner of Internal Revenue, dated March 28, 1941, the last two paragraphs of which read as follows (R. 16):

6. Petitioner respectfully represents that a reasonable and lawful Stamp Tax upon said stock taxed by your office, instead of being the sum of \$1,305.00, was and is not to exceed the sum of \$100.00.

Wherefore, petitioner respectfully prays a return of the sum of \$20.00, being over-payment in such amount.

On March 24, 1941, the taxpayer filed an agreement, and also its protest against the amount of taxes in question, with the Collector of Internal Revenue wherein it agreed to make monthly payments of \$120 on the fifth day of each month until the total amount of the tax and interest theretofore assessed shall have been paid. (R. 16.)

Subsequent to the date of the above agreement

but prior to the filing of the claim for abatement (Form 843) and the petition for refund, the taxpayer had paid to the Collector of Internal Revenue on March 24, 1941, the sum of \$120 only. However, prior to the commencement of this action on December 23, 1941, the taxpayer made the following payments to the Collector: \$120 on May 8, 1941; \$120 on June 10, 1941; and \$240 on October 8, 1941. The claim for abatement (Form 843) was considered by the Commissioner of Internal Revenue and was rejected by letter to the taxpayer on June 17, 1941. No separate action was taken by the Commissioner with respect to the "Petition for Refund", which was filed on April 5, 1941, and this action was begun on December 23, 1941. (R. 17.)

Upon the basis of the foregoing facts, the District Court concluded as a matter of law and held that the taxpayer was liable under Section 1802(a), Internal Revenue Code, for a stamp tax of only \$37.50 instead of \$55 as assessed by the Commissioner on the original issue of 50,000 shares of its stock² upon its incorporation in 1940; but that it was liable under Section 1802(b), Internal Revenue Code, for documentary or stamp taxes in the sums of \$1,100 and \$80 assessed on the transfer of Griffiths' right to re-

²The Collector took no appeal from this decision.

ceive the 22,000 shares of stock which he donated to the taxpayer's treasury, and on the transfer of 1,600 shares of the taxpayer's treasury stock to Clothier and Sell, respectively. (R. 17-18.) The court below thereupon entered judgment in favor of the Collector accordingly (R. 19-20), from which the taxpayer appealed to this Court (R. 21).

SUMMARY OF ARGUMENT

1. The taxpayer's claims in abatement and for refund of documentary stamp taxes in the respective amounts of \$1,235 and \$20, rejected by the Commissioner, could give jurisdiction in this proceeding only to the extent of the amount specified in the claim for refund. There is no provision in law for abatement claims to constitute the basis for a suit to recover internal revenue taxes, penalties or other disputed amounts. Under the pertinent statute, a suit for the recovery of such taxes, penalties or other amounts claimed to have been erroneously or illegally assessed or collected may be maintained only upon the filing of a claim for refund with the Commissioner of Internal Revenue, according to the provisions of the law and regulations in that regard, after rejection of the claim by that official or six months after filing if no action has been taken thereon in the meantime. Since the taxpayer's claim for refund failed to make a claim also

for "such greater amount as is legally refundable", its maximum recovery is limited to the amount specified in the claim. The major portion of the amount of refund claimed was allowed by the District Court, and the balance is nonrefundable because the taxpayer concedes a tax liability greater than the amount claimed as a refund.

2. Alternatively, the taxpayer is liable in any event under the taxing statute for stamp taxes on the several transactions herein involving transfers of stock and of rights to receive stock, as assessed by the Commissioner and to the extent found by the District Court. Thus, the taxpayer's original issue of 50,000 shares of no par value stock to its incorporators in exchange for their assets turned in therefor upon incorporation in 1940 clearly constituted taxable transfers on the basis of the valuation of the stock found by the District Court and at the rates of taxation specified in the taxing act applicable to transfers of no par value shares of a value of less than \$20 a share. The taxpayer's contention that the District Court erred in its finding of value of the stock in question is untenable for the reason that the court's findings must be presumed to be supported by the evidence when, as herein, the evidence is not brought up on appeal.

3. The donation by Griffiths, the taxpayer's principal stockholder, of 22,000 shares of no par value stock to the taxpayer as treasury stock constituted a taxable transfer of rights to receive such shares within the meaning of the taxing act. The taxpayer admits that Griffiths gave that number of shares, out of the block of 39,000 shares he originally subscribed for, back to the taxpayer to be held as treasury stock for sale to others, as the court below found. The taxing statute imposes stamp taxes on all sales or transfers of legal title to shares or certificates, whether shown by the corporate books or any delivery pursuant to an agreement or other evidence of transfer, where such shares are without par or face value but of a value less than \$20 a share, as herein. It is immaterial whether the transfer of the rights to receive was effected by gift or otherwise, the fact of transfer having given rise to the incidence of the tax. Since the transfer falls squarely within the specific terms of the taxing act, the Commissioner's assessment of the stamp tax as affirmed by the District Court is correct.

4. The taxpayer's sale and transfer of 1,600 shares of its treasury stock, donated to it by Griffiths, to its creditor Clothier in partial discharge of a debt, and to its employee Sell to retain his services,

respectively, as found by the court below and admitted by the taxpayer, plainly constituted taxable transfers of such shares within the meaning of the taxing statute. Consequently, the stamp taxes assessed on those transactions by the Commissioner and affirmed by the court below must be allowed to stand as correct.

ARGUMENT

I

THIS COURT IS WITHOUT JURISDICTION IN THIS PROCEEDING EXCEPT TO THE EXTENT OF THE TAXPAYER'S CLAIM FOR THE REFUND OF \$20 DOCUMENTARY STAMP TAXES.

Under the facts herein this action was inopportune brought by the taxpayer on the basis of the abatement claim rejected by the Commissioner. Such actions, however, may properly be brought under the statute only on the basis of claims for refund or credit³ rejected by the Commissioner or not acted upon by him within six months after filing. Section 3772(a) (1) and (2), Internal Revenue Code (Appendix, *infra*). In this connection, the pertinent facts

³Since claims for credit may not be filed by taxpayers, a claim for refund is the only claim which may be filed as a basis for suit. *Rock Island &c. R.R. v. United States*, 254, U.S. 141.

show that because of the taxpayer's failure to affix and cancel appropriate documentary stamps in respect to its original issue of 50,000 shares of no par value stock, and the subsequent transfers of 23,600 shares of its treasury stock (R. 406, 13-14), the Commissioner of Internal Revenue assessed on January 29, 1941, stamp taxes on such transactions in the principal amount of \$1,235 (R. 6, 10, 15). The taxpayer, pursuant to an agreement entered into on March 24, 1941, with the Collector of Internal Revenue (R. 16), made installment payments in connection with such assessment on March 26, May 8, June 10, and October 8, 1941, in the amounts of \$120, \$120, \$120, and \$240, respectively (R. 8, 10, 17). The taxpayer on April 5, 1941, and before the second tax installment was paid on May 8, 1941, filed a claim in abatement for \$1,235, plus penalty and interest of \$170.15, together with a claim for the refund of \$20 of the taxes in question, both of which claims⁴ were rejected by the Commissioner on June 17, 1941. (R. 8, 11, 16-17.) After filing the claims and prior to the commencement of this action on December 23, 1941, the tax-

⁴The taxpayer's claim in abatement (Form 843), to which it had attached a document entitled "Petition for Refund" requesting the "return of the sum of \$20.00, being overpayment in such amount", was considered in its entirety by the Commissioner to be a claim in abatement and was rejected by him ac-

payer made additional payments aggregating \$480. (R. 10, 17.)

Under these facts, therefore, the taxpayer had actually paid only \$120 of the taxes in question at the time it filed its claims in abatement and for refund. The tax payments made after filing the claims, whether made before or after institution of suit, could not, of course, be involved in this proceeding since a claim for refund must be filed after payment of the tax. *Israelite House of David v. Holden*, 14 F. (2d) 701 (W.D. Mich.); *Rock Island &c R.R. v. United States*, 254 U.S. 141⁵. Moreover, while the filing of the abatement claim could have been the basis for an *abatement* of the taxes in question by the Commissioner or Collector (Section 3770, Internal Revenue Code, as amended by Section 508, Second Revenue Act of 1940, c. 757, 54 Stat. 974), it could not, upon rejection by the Commissioner or otherwise, have constituted the basis for a suit for the recovery or *refund* of any internal revenue tax, penalty, or other sum claimed to have been erroneously or illegally assessed

cordingly on June 17, 1941. (R. 11, 16, 17.) No separate action was taken by the Commissioner with respect to the claim for refund of \$20. (R. 17.)

⁵Cf. *Kemper Military School v. Crutchley*, 274 Fed. 125 (W.D. Mo.) (holding a deduction can not be claimed for the first time in court).

or collected. The statute provides that such suit may be maintained only upon the filing of a claim for refund with the Commissioner, according to the provisions of the law and regulations in that regard. Section 3772(a) (1) and (2), Internal Revenue Code⁶. A claim for refund therefore is the only claim which may be filed as a basis for suit, and this rule applies even though a prior claim for abatement was rejected, as herein. *Rock Island &c. R.R. v. United States*, *supra*. In *Jewett & Co. v. United States*, 19 F. Supp. 363 (W.D. N.Y.), the complaint of the taxpayer was dismissed because no refund claim had been filed. In *James A. Hearn & Son v. United States*, 8 F. Supp. 698 (C.Cls.), certiorari denied, 294 U.S. 722, it was held that a refund claim was a condition precedent to a suit based on Sections 607 and 609 of the Revenue Act of 1928, and that a mere statement in the petition that a claim was "duly filed" was insufficient.

Accordingly, the maximum amount which in any event can be involved in this proceeding is \$20, claimed by the taxpayer in its somewhat informal

⁶Section 3772, Internal Revenue Code, is a re-enactment of Section 3226, Revised Statutes, as amended by Section 1103, Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 807 of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

“Petition for Refund”.⁷ (R. 11, 16.) Inasmuch as the court below held that the taxpayer was liable for stamp taxes of only \$37.50 instead of the amount of \$55 assessed by the Commissioner on the original issue of 50,000 shares, and the Government took no appeal therefrom,⁸ the taxpayer’s claim for refund has already been allowed in the sum of \$17.50⁹. Therefore, there remains only \$2.50 still involved in this proceeding. Since the taxpayer concedes liability for a “lawful Stamp Tax * * * not to exceed the sum of \$100.00” originally paid (R. 16, Br. 11), however, there is no remaining basis for further consideration or allowance of its claim for refund, and consequently the judgment of the court below is correct.

Under a claim for refund which specifies a cer-

⁷There may be doubt as to the effectiveness or validity of this claim since an informal claim is not sufficient. *Balto. & Ohio R.R. v. United States*, 260 U.S. 565.

⁸See Footnote 2, *supra*.

⁹The Treasury Department was requested by the Attorney General in a letter dated April 14, 1943, to issue a certificate of overassessment for this amount in favor of the taxpayer so that the total assessment of stamp tax liability against the taxpayer will be \$1,217.50, in harmony with the decision of the court below (R. 17-18), instead of \$1,235 as originally assessed by the Commissioner (R. 15).

tain amount "or such greater amount as is legally refundable", the taxpayer may sue for a larger amount than is set forth in the claim provided the entire suit proceeds on the ground set forth in the claim. *Electric Storage Battery Co. v. McCaughn*, 54 F. (2d) 814 (E.D. Pa.); to the same effect see *Osborn v. United States*, 54 F. (2d) 824 (C.Cls.); *Dalton Foundries v. United States*, 56 F. (2d) 483 (C.Cls.); *F. W. Woolworth Co. v. United States*, 15 F. Supp. 679 (S.D. N.Y.), reversed, but not on this point, 91 F. (2d) 973 (C.C.A. 2d), certiorari denied, 302 U.S. 768. Since the taxpayer's claim for refund specified only \$20, however, and made no claim for any greater sum which might be legally refundable, it is clear that any recovery herein must be limited to that amount. Section 3772, Internal Revenue Code.

In the event the foregoing should be considered insufficient, the following is submitted alternatively.

II

IN ANY EVENT, THE STAMP TAX ASSESSED
ON THE ORIGINAL ISSUE OF 50,000 SHARES
WAS PROPER

Upon the taxpayer's incorporation on July 5, 1940, Griffiths, his wife, and Parry subscribed for 50,000 shares of the original issue of stock which the court below found "had an actual value of

\$25,000". (R. 14.) Since the taxpayer failed to affix thereto and cancel the proper documentary stamps, the Commissioner assessed stamp taxes in the sum of \$55 on the transaction (R. 15) but the court below reduced the assessment to \$37.50¹⁰ (R. 17-18).

The taxing statute imposes a stamp tax on each original issue of certificates of stock of a value of less than \$100 per share at the rate of three cents on each \$20 of actual value or fraction thereof of such certificates, or of the shares where no certificates were issued. Section 1802(a), Internal Revenue Code, as amended (Appendix, *infra*). It is immaterial, of course, that certificates for the entire 50,000 shares were not issued by the taxpayer (R. 14), since the statute taxes a transfer of such stock "or of the shares where no certificates were issued". It follows, therefore, that the amount of the stamp tax liability determined by the District Court was correct.

The taxpayer contends substantially that the District Court's finding of a value of \$25,000 for the

¹⁰The District Court's determination of a stamp tax liability of only \$37.50 on the original issue of the taxpayer's 50,000 shares was based on a valuation thereof of \$25,000 which, under the taxing statute, was subject to a stamp tax liability at the rate of three cents on each \$20 of actual value thereof (\$25,000 divided by \$20 equals \$1,250, times three cents equals \$37.50).

stock in question is not supported by the evidence and fails to sustain its conclusion as to the tax liability (Br. 8, 11-14); and also that the valuation found disregarded the provisions of the statute which requires the "actual value" of the stock to be found (Br. 12).

As the taxpayer states (Br. 8), however, the evidence was omitted from the record on appeal. It is settled that the trial court's findings are presumed to be supported by the evidence when the evidence is not brought up. *Canal Bank v. Hudson*, 111 U.S. 66, 81; *Commissioner v. Crescent Leather Co.*, 40 F. (2d) 833 (C.C.A. 1st). Consequently, there being no evidence to compel a contrary conclusion, the District Court's findings and conclusion in respect to the value of the stock in question must, in the absence of the supporting evidence, be accepted as correct. They may therefore not properly be set aside (Rule 52(a), Federal Rules of Civil Procedure), as this Court and other courts have frequently held. *Commissioner v. Neaves*, 81 F. (2d) 947, 949 (C.C.A. 9th); *Commissioner v. Gerard*, 75 F. (2d) 542, 544 (C.C.A. 9th); *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676, 679 (C.C.A. 9th); *Commissioner v. Burdette*, 69 F. (2d) 410, 411 (C.C.A. 9th); *Tidwell v. Anderson*, 72 F. (2d) 684, 687 (C.C.A. 2d); *Prey*

Bros. Live Stock Commission Co. v. Commissioner,
36 F. (2d) 326, 327 (C.C.A. 10th).

III

GRIFFITHS' DONATION OF 22,000 SHARES AS TREASURY STOCK TO THE TAXPAYER CONSTITUTED A TAXABLE TRANSFER OF "RIGHTS * * * TO RECEIVE SUCH SHARES" WITHIN THE MEANING OF SECTION 1802(b), INTERNAL REVENUE CODE, AS AMENDED

The District Court found that under Griffiths' offer of July 9, 1940, accepted by the taxpayer, the 22,000 of his 39,000 shares originally subscribed for were donated by him to the taxpayer as its own property to remain as fully paid and nonassessable treasury stock for later sale to others. (R. 14-15) Accordingly, the court upheld the Commissioner's determination (R. 15) of a stamp tax liability assessed in the sum of \$1,100 on the transaction as the proper amount due under Section 1802(b), Internal Revenue Code, as amended, on the transfer of the right to receive such number of shares donated by Griffiths to the taxpayer's treasury (R. 18, par. III).

The taxpayer contends substantially that this action was erroneous in that there is no stamp tax upon such a naked donation or transfer of rights to receive (Br. 11); that the 22,000 shares of stock in ques-

tion were not issued to Griffiths although he "could have taken it with no added expense"; and that since the "22,000 shares were given by Griffiths to the company without nominee or direction for its disposal", the transaction was not taxable (Br. 12-13).

The taxpayer admits, however, that "Griffiths donated appellant 22,000 of those [39,000 shares] he subscribed for" (Br. 6), and that the 22,000 shares were given by Griffiths to the taxpayer as treasury stock (Br. 12). It also concedes that it subsequently issued certain portions of the treasury stock to others (Br. 13), as the court below found (R. 14-15). It necessarily follows, therefore, that Griffiths could not have given those shares back to the taxpayer as treasury stock if he had not first received title thereto upon his original subscription for 39,000 shares. We have already shown under point II, *supra*, that Griffiths in fact received the latter number of shares as an original subscription from the taxpayer, even though no certificates were issued therefor, and that the transaction constituted a taxable transfer. He therefore became the initial owner of the stock at least for an instant, whether or not the transfer was recorded on the taxpayer's books or certificates were issued therefor. *Richardson v. Shaw*, 209 U.S. 365; *Richards v. Robin*, 175 App. Div. 296, 162 N.Y. Supp. 12,

affirmed, 225 N.Y. 719. There could be no clearer case of a statutory taxable transfer of "rights * * * to receive such shares", therefore, than when the "22,000 shares were given by Griffiths to the company" as treasury stock, as the taxpayer states (Br. 12), and as the court below found (R. 14-15). It is clearly immaterial whether the transfer was effected by gift or otherwise; the fact of transfer gave rise to the incidence of the tax.

Although the taxpayer objects to the value of the stock as found by the court below and claims it "would be nominal" and "should not exceed \$100" in toto (Br. 11), the fact remains that the tax assessed by the Commissioner constitutes the lowest possible rate imposed by the taxing statute on no par value stock of a value less than \$20 a share, as herein. Therefore, regardless of any claimed unproved lesser value of the stock in question, the tax liability on the transfer could not be less in any event. Moreover, in the absence of any evidence in the record to show a value different from that found by the court below, the court's finding of value must stand, as heretofore shown.

The statute imposes a tax "on all sales * * * or transfers of legal title to any * * * shares or certificates * * * or to rights * * * to receive such shares or

certificates, whether made upon or shown by the books of the corporation * * *, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale * * * where such shares or certificates are without par or face value", at the minimum rate of five cents a share. Section 1802(b), Internal Revenue Code. Since the transaction in question falls squarely within the terms of the taxing statute, therefore, the District Court's holding that the taxpayer is liable for stamp taxes in the sum of \$1,100 assessed under the provisions of that statute on the transfer of the right to receive 22,000 shares is correct and should be affirmed by this Court. *Raybestos-Manhattan Co. v. United States*, 296 U.S. 60; *Founders General Co. v. Hoey*, 300 U.S. 268; *Maloney v. Portland Associates*, 109 F. (2d) 124, 127 (C.C.A. 9th); *Standard Oil Co. of California v. United States*, 90 F. (2d) 571 (C.C.A. 9th); *United States v. Revere Copper & Brass*, 100 F. (2d) 391 (C.C.A. 2d); *United States v. Brown Fence & Wire Co.*, 9 F. Supp. 1008 (N.D. Ohio), affirmed *per curiam*, on the authority of *Founders General Co. v. Hoey*, *supra*, 88 F. (2d) 1005 (C.C.A. 6th); *United States v. Vortex Cup Co.*, 84 F. (2d) 925 (C.C.A. 7th); *American Gas Machine Co. v. Willcuts*, 87 F. (2d) 924 (C.C.A. 8th).

IV

THE TAXPAYER'S SALES AND TRANSFER OF
1,600 SHARES OF ITS TREASURY STOCK TO
CLOTHIER AND SELL CONSTITUTED TAX-
ABLE TRANSFERS

The District Court found that the taxpayer, from the 22,000 shares of its stock donated to it as treasury stock by Griffiths, sold and transferred 1,000 and 600 shares thereof to M. Clothier in part payment of a prior debt, and to Donald Sell in consideration for his remaining in its employ, respectively. (R. 13-14, 15.) Accordingly, the court held that the taxpayer is liable under Section 1802(b), Internal Revenue Code, as amended, for stamp tax liability in the sum of \$80, as assessed by the Commissioner (R. 15), on the transfer of such shares (R. 18, par IV).

The taxpayer contends with respect to these transfers that the shares had only a nominal value and therefore should not have been taxed on the basis assessed by the Commissioner and found by the court below. (Br. 13.) The value found by the District Court, however, must stand in the absence of the sup-

¹¹The cases relied upon by the taxpayer (Br. 22-24) are distinguishable on their facts and have no direct application to the present case. In this connection, the taxpayer admits (Br. 19) that it "has been unable to find a case in point on all aspects of this one."

porting evidence, as heretofore shown.

Moreover, since the taxpayer admits that Griffiths gave 22,000 shares back to it as treasury stock to be held as its own property for subsequent sale to others, as the court below found, and also that "later, the company issued Class C shares to creditor Clothier and worker Sell and their 1600 shares were taxed \$80" (Br. 13), there can be no question that the taxpayer thus transferred that number of shares from its treasury to them. Upon these admissions of the sale and transfer of the two blocks of treasury stock in question, therefore, it is apparent that the court below had no alternative than to affirm the Commissioner's action, and consequently to hold that the taxpayer is liable for the stamp taxes imposed upon the transfers thereof under the specific terms of Section 1802(b), Internal Revenue Code, as amended.

CONCLUSION

It is submitted that this Court is without jurisdiction in this proceeding except to the extent of the taxpayer's claim for refund of \$20, and therefore, the judgment of the District Court should be affirmed.

Alternatively, the District Court correctly held, in accordance with law and the authorities, that the taxpayer is liable for stamp taxes in the amounts of

\$37.50 on the original issue of 50,000 shares of its stock, \$1,100 on the transfer of the right to receive 22,000 shares donated by Griffiths to it as treasury stock, and \$80 on the sale and transfer of 1,600 shares to Clothier and Sell, respectively, as shown under Points II, III, and IV, *supra*. The judgment of the court below should therefore be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

SEC. 1802. [as amended by Sec. 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862] CAPITAL STOCK (AND SIMILAR INTERESTS).

(a) *Original Issue*.—On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: *Provided*, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the

shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued.

(b) *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each \$100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1941, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1941, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be): *Provided*, That in case the selling price, if any, is \$20 or more per share the above rate shall be 5 cents instead of 4 cents until July 1, 1941:

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(U.S.C. 1940 ed., Title 26, Sec. 1802)
SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall

be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time*.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

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(U.S.C. 1940 ed., Title 26, Sec. 3772)

